ANSWER

TO

MR. JEFFERSON.

AN

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MR. JEFFERSON'S

JUSTIFICATION OF HIS CONDUCT

IN THE CASE OF

THE

NEW ORLEANS BATTURE.

BY EDWARD LIVINGSTON.

Nullæ sunt occultiores insidiæ, quam quæ latent in simulatione officii, aut in aliquo necessitudinis nomine.

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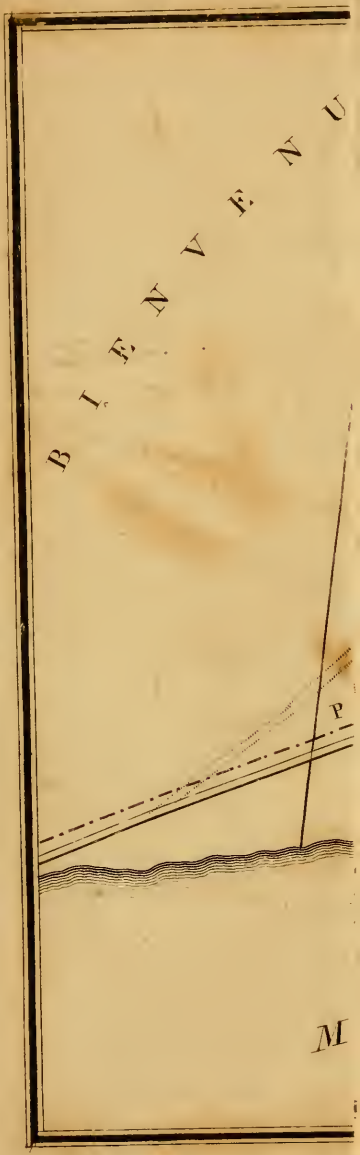
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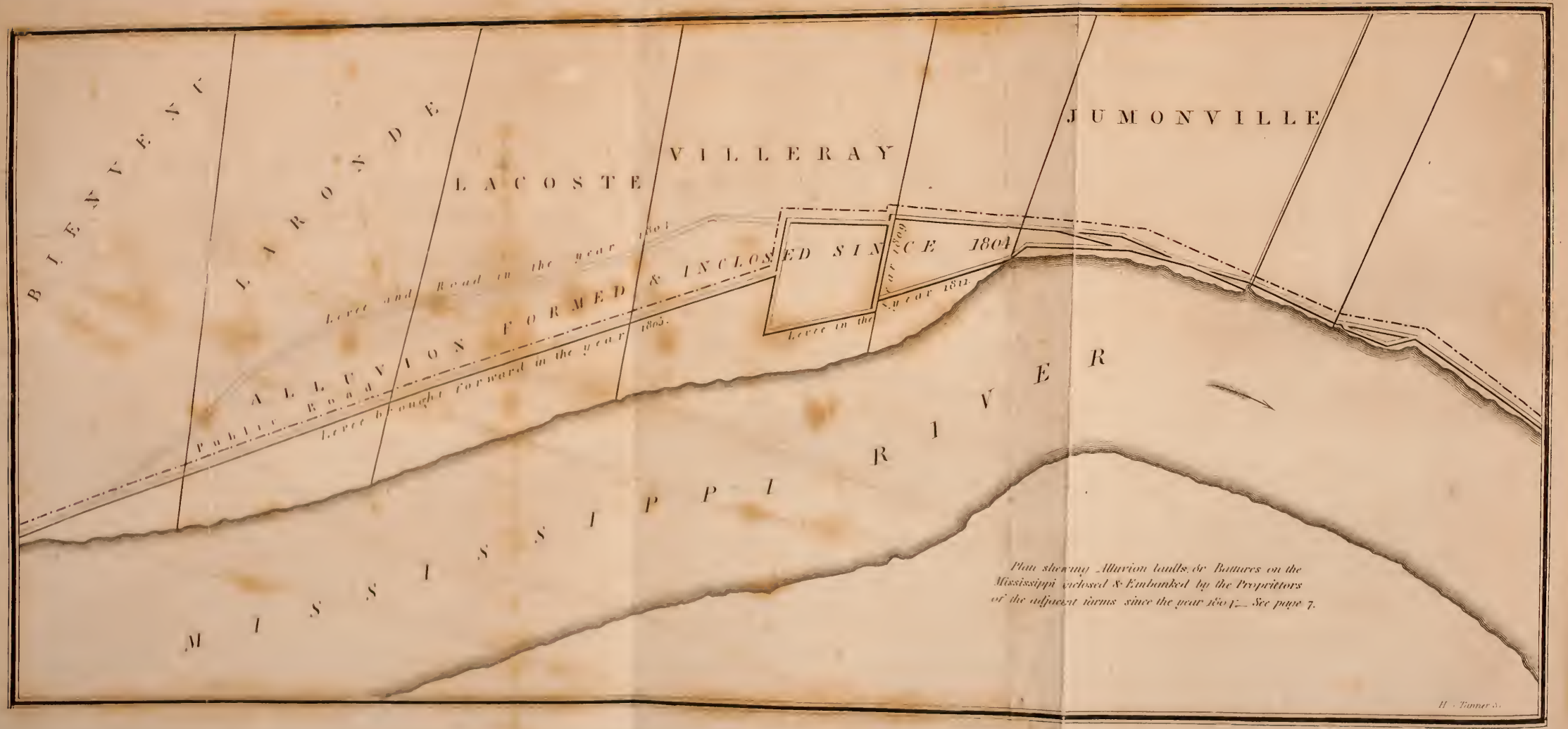
H S Tanner


BIENVENU
LARONDE
LACOSTE
VILLERAY
JUMONVILLE
Levee and Road in the year 1801
ALLUVION FORMED & INCLOSED SINCE 1804
Levee in the year 1809
year 1811
Levee brought forward in the year 1805.
Public Road
MISSISSIPPI RIVER
Plan shewing Alluvion laulds &c Batures on the Mississippi inclosed & Embanked by the Proprietors of the adjacent farms since the year 1804 — See page 7.
H. Tanner Sc.

descending to the Cypress Swamp, 14 feet 10 inches.

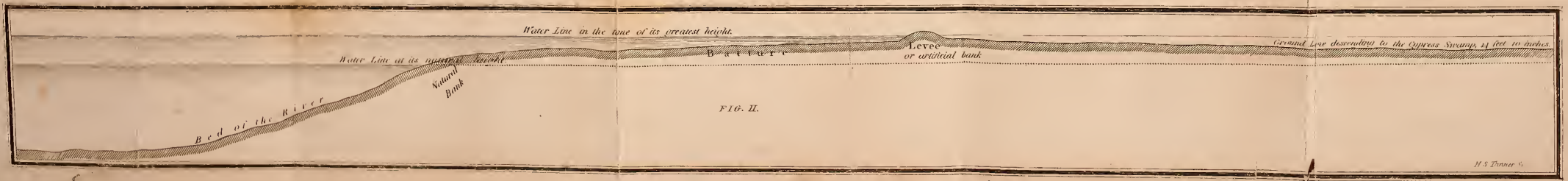
H.S. Tanner Sc

ANSWER TO MR. JEFFERSON.

WHEN a public functionary abuses his power by any act which bears on the community, his conduct excites attention, provokes popular resentment, and seldom fails to receive the punishment it merits.—Should an individual be chosen for the victim, little sympathy is created for his sufferings, if the interest of all is supposed to be promoted by the ruin of one. The gloss of zeal for the public is therefore always spread over acts of oppression, and the people are sometimes made to consider that as a brilliant exertion of energy in their favour, which, when viewed in its true light, would be found a fatal blow to their rights.

In no government is this effect so easily produced as in a free republic; party spirit, inseparable from its existence, there aids the illusion, and a popular leader is allowed in many instances impunity, and sometimes rewarded with applause for acts that would make a tyrant tremble on his throne. This evil must exist in a degree; it is founded in the natural course of human passions—but in a wise and enlightened nation it will be restrained —and the consciousness that it must exist, will make such a people more watchful to prevent its abuse. These reflections occur to one, whose property without trial or any of the forms of law, has been violently seized by the first magistrate of the Union—who has hitherto vainly solicited an inquiry into his title, who has seen the conduct of his oppressor excused or applauded, and who, in the book he is now about to examine, finds an attempt openly to justify that conduct upon principles as dangerous as the act was illegal and unjust.—This book relates to a case which has long been before the public, and purports to be the substance of instructions prepared by Thomas Jefferson, late president of the United States, for his counsel in a suit in-


Plan Shewing
1st the Distribution of the Jesuits Plantation.
2d The several Levees & Embankments made since the year 1718, as the Land increased by allurion.
3d The relative position of the several batturs held under the same title.
C.D.D. Canal & projected works.
E. House built by Livingston in 1807.
FIG. I.
Jesuits Plantation
Levee in the year 1726 and road at the same period
SINCE THE YEAR 1726
LEVEE & EMBANKED
Levee of 1803 & road
BATTURE OF SOLET
BATTURE OF DUPLANTIER
BATTURE OF THE SUBURB St MARY
DE LA BIGARRE
Inclosure made by J. Gravier in the year 1803
LIVINGSTON
Lower line of the Jesuits Plantation
B. LAFON
NEW ORLEANS
Eddy running up to the point A.
MISSISSIPPI RIVER
BATTURE OF LIVAUDIS
BATTURE OF ROBIN


Water Line in the time of its greatest height.
Water Line at its ordinary height
Levee or artificial bank
Ground Low descending to the Cypress Swamp, 14 feet 10 inches.
Natural Bank
Bed of the River
FIG. II.
H.S. Tanner Sc.

stituted by me against him.—After four years* earnest entreaty, I have at length obtained a statement of the reasons which induced him to take those violent and unconstitutional measures of which I have complained.

It would perhaps be deemed unreasonable to quarrel with Mr. Jefferson for the delay, when we reflect how necessary Mr. *Moreau's* Latin and Mr. *Thierry's* Greek, *Poydras's* elegant invective, and his own Anglo Saxon researches were, to excuse an act for which at the time he committed it he had no one plausible reason to allege. Such an act, certainly, is easier to perform than to justify, and Mr. Jefferson has been right in taking four years to consider what excuse he should give to the world for his conduct, and still more so in laying under contribution all writings, all languages, all laws, and in calling to his aid all the popular prejudices which his own conduct had excited against me. He wanted all this and more, to make a decent defence. But it was rather awkward to press into his service facts which it is confessed he did not know at the time, and something worse than awkward to impose on the public, as I shall shew he has, by *false translations* and *garbled testimony*. But we must excuse the late president; "*his wish had rather been for a full investigation of the* MERITS *at the* BAR, *that the public might learn in that way, that their servants had done nothing but what the laws had authorised and required them to do;*" and "PRECLUDED *now from this mode of justification, he adopts that of publishing what was meant originally for the private eye of counsel.*" I give the words of the author here, lest in this extraordinary sentence I should be suspected of having misrepresented or misunderstood him. An individual holding a tract of land under one whose title had been acknowledged and whose possession had been confirmed by a court of competent authority, is violently dispossessed by the orders of the president of the United States, without any of the forms of law and in violation of the most sacred provisions of the constitution; the ruined sufferer seeks redress, first by expostulation;—he offers to submit to the decision of indifferent men, and he is refused;—he offers to abide by the sentence of men chosen by the president, and he is

* See in my correspondence with the attorney general, page 14, the ineffectual entreaties I used to obtain a copy of his opinion and a statement of the reasons on which he acted.

refused;—he offers in the simplicity of his heart to acquiesce in the opinion even of the president himself—and he is refused. He is not even permitted to exhibit his proofs. Fearing the conviction they would produce, he is told that though the president could take, he cannot restore; that he can injure, but not redress; and that congress alone are competent to grant him relief. To congress, then, he applies;—here the same baleful influence prevails. After two voyages of three thousand miles each, after two years of painful suspense and humiliating solicitation, after an attendance of three sessions, he finds that no means can be devised for his relief, that the friends of that man who "*wishes for a full investigation of the merits at the bar*," defeat every plan for bringing the cause before a court, vote against every law providing for a trial, and effectually, as *they* think and *he* hopes, bar all access to any tribunal where the dreaded merits of the case could be shewn.—Harassed but not dispirited, the injured party, finding that no legislative aid can be expected to restore his property, at length applies by suit for a compensation in damages;—he appeals to the laws of his country, and is willing to abide by the decision of a jury, in a country where long residence, great wealth, the influence which had been created by office, and a coincidence of political opinion gave every advantage to his opponent.—Here then is an opportunity which a man desirous of open investigation will not neglect. The upright officer who has been unjustly accused of oppression, will justify himself to his country, and cover his accuser with confusion. The vigilant guardian of the public rights will defend them before an enlightened tribunal, and expose the rapacity of the intruder. He who "stands conscious and erect" will rejoice in the investigation of his innocence—he will discard every form, and proudly dare his adversary to a discussion of the merits!

But the man I speak of does not do this—the man I speak of did not dare to do this.—He feared the learned integrity of a court;—he feared the honest independence of a jury. He entrenched himself in demurrers, sneaked behind a paltry plea to the jurisdiction, and now publishes to the world, that he is *precluded* from this mode of justification, and that "his wish had been for a full investigation of the MERITS at the BAR."

If such indeed were his wish, why was it not gratified? and by whom was he *precluded* from this favourite mode of defence?

He does not indeed hazard the direct assertion, that it was the unsolicited act of the court. His plea to the jurisdiction, his demurrers, not to mention an attempt to stifle the suit in its birth, by a rule to find security for costs;—all these would too apparently falsify such an assertion. But though not stated in direct terms, is not the idea strongly conveyed? was it not meant to be thus conveyed? When Mr. Jefferson says that the suit was dismissed on the question of jurisdiction, and that "his wish had rather been for a full investigation of the merits at the bar," what are we to conclude? what, I repeat, did he intend we should conclude, but that the decision of the court was unsolicited and contrary to his wish—and yet, he, the gentleman who tells us this, had put in a plea to the jurisdiction, that is to say, prayed the court *to dismiss the cause without an investigation of the merits.* He did more;—fearing that this question might be decided against him, he put in a demurrer to the declaration, that is to say, he took an exception to its form,* and prayed the court a second time, that on this account also *the cause might be dismissed without an investigation of the merits.* He did not stop here; a third battery was erected,—he pleaded another plea, that he did the act complained of, as president of the United States, and that therefore he ought not to be made liable in his individual capacity; and a third time prayed the court that the cause might be *dismissed without an investigation of the merits.* How Mr. Jefferson can reconcile these pleas with his wish to obtain a hearing on the merits, it is difficult to conceive. The coward, who, on receiving a challenge, resorts to the interposition of a magistrate, might as well bluster about his desire fairly to face his adversary, and complain that he was precluded from giving him satisfaction. Yet this preclusion is stated by Mr. Jefferson as his reason for publishing the work which I am now about to examine. He had many advantages in the execution, and promised himself many more in the effects of this production. The subject had been fully and ably discussed, but the publications on the adverse side were not in many hands. A considerable

* One of the causes set forth for the demurrer is curious. He objects to the declaration, because the plaintiff does not name the servants of the president who committed the trespass, and because they are not *made parties* to the suit: the president of the United States wished the innocent ministers of his illegal acts to be made fellow-sufferers with him, for executing his orders!!

time had elapsed since the subject engaged the public attention. He had therefore only to arrange the arguments in his favour, to suppress or mutilate the conclusive answers which had been given to them, to collect all the quotations which had been used in the discussion, to give a new dress and the sanction of his name, to the calumnies circulated against his opponent; and he would make a book that should astonish by the polyglot learning of its quotations, amaze by the profundity of its borrowed research, and delight kindred minds by the poignant elegance of its satire. Add to these the advantages of using hearsay testimony, ex parte testimony, interested testimony, his own testimony; of quoting authorities with an *et cetera* for those parts which bear against his positions, of omitting a word in the translation of a deed, and founding a long argument on the false reading thus created; add the facility of gaining over to his party that large portion of mankind, who find it much more convenient to be convinced by the reputation of the author than to examine his work; and above all, the hope that disappointment and despondence might silence his opponent;—and we shall have much better reasons for resorting to a publication of his "instructions to counsel" than the alleged preclusion of a hearing at the bar.—Whatever may have been the causes which produced this work, I rejoice exceedingly in the effect. My wish also had "rather been for a full investigation of the merits at the bar," but an appeal to the public is preferred, and I shall not decline it. Causes of less importance have sometimes excited an interest, not only in the countries where they originated, but abroad. The despotic king of Prussia could not oppress one of his subjects under the forms of law, without exciting the indignation of Europe. Lawyers of the greatest eminence took cognisance of the affair, and the force of public opinion, even in a military monarchy, obliged the prince to do justice to his vassal. Shall I then fear a less beneficial effect, when I can shew that the free citizen of a free country, has been deprived of his property by its first magistrate, without even the forms of law?—I do not fear it. However dull may be the discussion, however laborious the research, it will not deter those who have an interest in inquiring whether their "*servant* has done his duty," or has been guilty of unconstitutional violence.—I invite readers of this description to follow me in the investigation I am about to make.

So much misrepresentation has been used in the discussion, that it will be necessary to begin with a statement of facts, which shall be as brief as may be consistent with a development of material circumstances.

The Mississippi flows through a country evidently gained from the sea, for about one hundred and fifty miles from its mouth. On the western side, this alluvial country has a much greater extent. As in all lands formed wholly by the deposit of rivers, which overflow, the ground is highest near the bank, and slopes in an inclined plane to the level of the waters which receive those of the river, terminating here at irregular distances, in cypress swamps or *trembling* prairies*. This conformation of the soil is very evident and uniform on the Mississippi. The surface of the water, when it is not swelled by the rains and dissolving snows above, is at New Orleans about nine feet below the natural bank. When swelled to its greatest height, it rises about five feet above the level of this bank, and would of course overflow the whole country, unless dykes, there called *levees*, were raised to confine it. These are about the average measures. There are places in which they vary, where the natural bank is not above five or six feet above the surface at low water, and where, of course, an embankment of nine feet and upwards, is necessary to restrain the water in its swell. Fig. 2, plate 2, represents this natural and artificial bank, with the general section of the shores and adjacent land.

The Mississippi is a deep, rapid, meandering and turbid river. From these characters it results, that where it flows, as it generally does through a light soil, it makes frequent encroachments on the one bank; and wherever the water become stagnant behind a point, or at the edge of an eddy, leaves a deposit on the other. Should this deposit be made in the middle of the river, it forms a sand bank, and when it arises above the surface of the water, at its natural height, an island. But if the deposit be made as it generally is, adjacent to the bank, it then becomes what is called in the country a *batture* or alluvion. These batures, low at first, gradually rise, by successive deposits, above the surface of the water at its *natural* height; and when they are

* Those marshes which have not acquired a sufficient consistency to produce trees, and shake to a considerable distance when trodden on, are in Louisiana called *prairies tremblantes*.

encreased, so as to leave not more than five or six feet water upon them at the time of the inundation;—that is to say, when they attain the height, or nearly the height of the natural bank, the proprietor of the land in front of which they are formed, generally raises a new embankment or levee, so as to include the soil thus created, and protect it from the inundation. The land thus gained, becomes incorporated with the original plantation; the old embankment is suffered to decay, and the road is generally removed, so as to continue along the course of the new levee. These battures are very common on the banks of the Mississippi; and as the land is valuable, they are very generally reclaimed in the manner I have stated. Plate 1, fig. 1, contains the surveys of several of these inclosures, situated about two leagues below the city, and containing several hundred acres, which have been embanked since the change of government, by the planters whose names are found on the plan; five hundred other instances at least could be given. A still more striking example may be found in the plan of the very lands now in dispute, (plate 2,) where the successive appropriations of the alluvion are laid down, from the first in the year 1726, of which the traces still remain, to those made at the present day. The premises in question are lands of this description, differing in nothing from the other alluvions or battures on the Mississippi, and only rendered remarkable by the illegal attempts which have been made to deprive the proprietor of their enjoyment. It may be proper also to add, that the batture of the suburb St. Mary, as will be seen from an inspection of the plan, is only the lower portion of a very large alluvion formed below the point A; that the eddy by which it has been formed, is occasioned by the projection of that point, and naturally runs to it; and that no works can at all impede or hasten the formation of the alluvion, unless they project further than that point.

From this description, aided by a reference to the plans, a tolerable idea may be formed of the natural features of this country, and of the situation and origin of the particular parcel of land in dispute. The title to it will be better understood by a knowledge of the following facts:

The only lands in the lower part of the province which were capable of cultivation, lie immediately on the river or its

branches, here called *bayous;* the grants therefore were located in an oblong form, extending generally from ten to twenty arpents (a hundred and eighty feet the arpent) in front, by forty in depth, except in particular situations, in which the nature of the soil induced the grantee to take a greater extent back. The road runs parallel to the river, generally within the embankment, but sometimes upon it. The road, as well as the embankment are made and repaired, at the expense of the proprietor of the land, the whole extent of his front; and severe laws oblige him to the performance of this part of the police.

The expressions used in those grants to designate the boundaries and extent, are generally, I believe I may say universally, so many *acres front*, or *front to the river*, (*tant d'arpents de face*, or *tant d'arpents face au fleuve*, or *sur le fleuve*); and these expressions, when thus unqualified, have, without a single exception, been considered as giving the grantee a boundary on the river.

The land in question is held under one of these grants, and is described as thirty-two arpents *de face sur le fleuve St. Louis;** for though the original patent (here called *concession*) be lost, yet we have a record of this part of its contents in the proceedings hereafter referred to.

This land was acquired by the order of Jesuits in three different purchases: one in the year 1726, from Mr. de Bienville, the governor of the province; another from the same person in the year 1728; and a third in 1743, from a Mr. Breton.

In the year 1763, the order of Jesuits was abolished in France, and all its estates forfeited to the crown. Although the province had then been ceded by France to Spain, yet as the treaty was still secret, and was not executed until six years afterwards, the edict of confiscation took place for the benefit of the crown of France, and under it the estate of the Jesuits at New Orleans was seized. These thirty-two arpents forming a part of it, were divided into six lots, and sold at auction by the same usual description, *so many acres front.* The part of this land adjoining the city, was purchased by persons from whom it passed, by regular conveyance, to Bertrand Gravier, who cultivated it as a plantation. In the year 1788, Bertrand Gravier divided the

* French name for the Mississippi.

front part, lying within the road, into two ranges of lots; in 1796 he enlarged the plan by adding three other streets in the rear, and at different times sold all the front and some of the rear lots to purchasers.

In these sales he describes the front lots, some of them as "*fronting the levee*," some as fronting the river, *conformable to the plan* which accompanied the deed. In some of them he expressly *conveys the batture* in front of lots sold, reserving, in a few instances, the right to take earth from it for his brick-kiln. Some of these deeds, conveying parts of the batture, are as early as 1788, and none of them are later than 1794.

In the year 1803, John Gravier (then become the proprietor) made an inclosure of about five hundred feet square on the batture. Prior to this, he does not appear to have interfered with a practice which the citizens of New Orleans had been in, of digging sand and earth from it. That property, however, was now becoming valuable, both from its gradual accession of height and extent, and from the growth of the town in its vicinity. Finding that the city and its inhabitants claimed as a right what he and his ancestors had only suffered from inattention, John Gravier determined to bring the pretensions of the city to a legal test. He commenced a suit for the purpose of being confirmed in his possession, and to prevent the city from troubling him with their groundless claims. This suit was pending for near two years; it was heard at three different times, and at length, by the unanimous opinion of the court, decided in favour of the plaintiff. During all this time, no suggestion was made of any title in the United States. The city alone claimed the right of *servitude** on the land, and (after the suit was commenced) the right of property. Immediately after the judgment it was however discovered by the corporation, that they had been defending a false claim. Their counsel moved for a new trial, on the ground that the title was in the United States. Most of the arguments since addressed to the public to prove this position, were then urged to the court, but without success; the judgment was confirmed and executed in the month of June, 1807.

* *Servitude* in the sense here used, in the civil law, is equivalent to the right of commonage for digging earth at the common law.

One of Gravier's vendees beginning to improve the property, was for some time impeded by a tumultuous assemblage of people, who, however, did not very long continue to oppose violence to the laws. He was suffered to proceed, and after he had expended upwards of thirteen thousand dollars in improvements, and a much larger sum in new purchases, a mandate arrived from Washington, ordering the marshal of the district to dispossess him by force. When astonishment and incredulity were forced to yield to the certainty of this extraordinary fact, the proprietor presented a petition to the superior court, and prayed their interference to prevent the execution of this illegal order; it was granted, and an injunction was delivered to the marshal, commanding him to desist from the execution of the mandate. This writ was however disregarded; an armed force was collected, and the proprietor was forced to abandon his possession; and from that time to the present, he has been employed in ineffectual attempts to obtain relief.

This is a general sketch as well of the situation of the property, as of the title by which it is held, and of the events which led to the controversy. It is but an outline which will be filled up in discussing the different points made by Mr. Jefferson to justify the conduct which he presumes to call, " Proceedings of the *Government* of the United States."

After some preliminary observations, which shall be noticed under their proper heads, the author enters on his subject. Its first division is an attack on the title of one proprietor in favour of others. This objection was with propriety raised on the trial of the cause at New Orleans; though unfounded in fact, it was not there absurd in its application, as it is when used by Mr. Jefferson. The only questions which it imports him to discuss are, Did the land belong to the United States? Had the government a right to seize it? Now whether belonging to Gravier, or sold to the front proprietors, the land was in neither case the property of the United States; and its seizure was equally unjustifiable.

The objection, I have said, was raised on the trial, and the report of the case shews it to have been conclusively answered. Gravier claimed the alluvion, because he was the proprietor to the water's edge; and he claimed to be the proprietor to the water's edge, by virtue of the general expressions, " *face sur le fleuve*,"

which it is not denied give that extent to all the grants in the country. Having, after a very considerable accretion had been gained by alluvion to his land, sold a line of lots along the road, which I have described as running within the levee, it was contended that because *some* of the deeds for these lots used nearly the same expression, face *au* fleuve, that is *fronting* TO *the river*, not as in ours, fronting *on* the river, a similar construction ought to be given to the expressions in both instruments, and the dilemma which the author urges with so much triumph, was, like most of his arguments, worn out before he took it into his service. The answer to this argument was a concise one. It was, that in the cases where these expressions were used in the deeds of the front proprietors, they were not, as in the case of our grant used alone, that they were restricted by a reference to the plan, and that this plan bounded the lots, not by the river, but by a line drawn across their front on the street; and an uncontrovertible text of law was cited to shew, that wherever such a boundary line existed between the land and the river, the proprietor of the lot could not claim the alluvion, for the plain reason, that he was not the proprietor to the water's edge, and that therefore, what was added by the water was not added to his land, but to the land which lay between his front boundary and the river. This explanation the late president of the United States does not like; it is compendious, he says, but not clear; it wants explanation, and, to use his own phrase, he "spreads it open" for examination; he selects one of the deeds, that to Nicholas Gravier. It conveys two parcels of lots, one of thirteen, *fronting the river*, and another of forty-five, in the rear, by other boundaries, "*in conformity to the plan.*" Then follows a page of reasoning to shew, that the words, *in conformity to the plan*, do not relate to the thirteen lots in the front, but to the forty-five in the rear; and on what, reader, do you think this reasoning is founded? Would you believe it?—on the omission of a troublesome word. The original is explicit; after describing both parcels of lots, it says, "THE WHOLE (*todo*) in conformity with the plan; which having been drawn by Don C. L. Trudeau, I have delivered to the purchaser," &c. It must be confessed, that for a man who wanted to shew that the reference to the plan was applicable only to a part of the lots, this expression, "THE WHOLE," "ALL," was the most embarrassing that could be

devised. What was to be done? Preserve it in the original Spanish, which not one in a thousand of his readers can understand; omit it in the translation, which every body will suppose accurate in so learned a work; and then argue from the omission, that the reference to the plan related to back lots only.* Of some of my reasoning the late president says, "that it is impossible to characterise it respectfully." What shall we say to this specimen of his own?

The whole argument on this head is of a piece. The sale to N. Gravier is selected, as if those to all the other proprietors contained the same expressions; whereas, a very great proportion refer for their front, not to the *river*, but to the levee; (*haciendo frente a la levee de este rio*) and among these is the deed to Mr. Poydras, who, in one of his publications, has the effrontery to say, "My deed of conveyance expressly contains these terms, *fronting the river*, without any reservation."

In several others the batture is *expressly granted*, and I have purchased from the grantees. I have paid ten thousand seven hundred dollars for parts of it, which were thus sold; and yet this, as well as the other, has been taken as the demesne of the United States. Now Mr. Jefferson (to return him his dilemma) either knew that this description, contained in the deed to N. Gravier, was not that used in the others, or he did not know it; if he knew it, he is unpardonable in concealing from the public, to whom he affects to make a candid appeal, so material a difference. If he did not know it, he confesses that he has deprived a citizen of his property, without being acquainted with the nature of his title. He must take one of these consequences, or he must acknowledge that the circumstance is totally immaterial to the issue. If material, the whole evidence ought to have been offered;—if immaterial, no part of it.

I think I may therefore dismiss this first head of justification, and that I may, without flattering myself, believe that I have shewn it both immaterial to the defence of the late president, and destitute of any foundation if material;—I have shewn that none of those front proprietors can be considered as owners of the alluvion, because their deeds refer to the plan, which does not carry them to the river; because very many of them refer not to the river, but to the levee, as their front exposure; and because those

* See Jefferson, p. 7

who have an express conveyance, (except one) have disposed of their right, by sale, to the present claimant; and in all events, if theirs, it ought, as their property, to have been as sacred as if mine.

Having thus secured the rights of the front proprietors, this provident magistrate next takes the co-heirs of John Gravier under his paternal care. He has discovered that John Gravier (in fraud of his brothers and sisters, as he charitably insinuates) procured the property of his deceased brother to be adjudged to him; that this batture was not comprised in the adjudication, and that it therefore remains the property of the heirs.—And what then, sir? Why if this statement be true, J. Gravier as one of the three heirs would have a right to convey his undivided third; but surely it gives none to you to take it away from his grantee or from the co-heirs in France.—As however, I know it must give great satisfaction to a mind so feelingly alive to the interest of absentees, to know that they are not dissatisfied with the transaction, I have the pleasure to inform you, that they have ratified their brother's sale of the batture, and that their concerns need no longer occupy your attention. Mr. Jefferson however, when he wrote his book, did not know this circumstance. Let us do him justice and attend to his reasoning from the facts before him.—On the death of Bertrand Gravier, an inventory was taken, according to the terms of it, "of *all the effects and property* of the deceased."—At the time of his death he owned the plantation in question, excepting such lots as had been sold. The plantation therefore as it stood, after deducting the quantity sold, was to be put in the inventory, and it there stands thus: "Item, are placed in the inventory, *the lands of this habitation** whose extent cannot be calculated on account of his having *sold many lots*, but Mr. N. Gravier informs us that its bounds go to the forks of the Bayou."—After the inventory was complete, appraisers were appointed to estimate its value; and in their appraisement the plantation stands thus:

"Item, about thirteen acres of land, *at which the habitation* is estimated including the garden, of which the most useful part is taken off in the front; the *residue* consisting of the lowest part which is enclosed in very bad fences, the side being sold to Don J. Navarro, one Percy, and the negro Zamba; a portion of the

* *Habitation* in the provincial language is synonimous with *plantation*.

best of which acres with twelve negro cabins, the appraisers estimate at one hundred and ninety dollars the front acre, with all the depth, which makes two thousand four hundred and seventy dollars."

After these preparatory steps follows the adjudication, which is in these words:

"Having seen the proceedings, and in consideration of the consent of J. P. Guinault, defender of the absent heirs, the effects, real estate, moveables and slaves, WHICH HAVE BEEN INVENTORIED as belonging to the estate of his deceased brother Bertrand Gravier, who died intestate, are adjudged to John Gravier at the price of the estimation."

After this adjudication John Gravier was put in possession (as appears by the record) of all the effects and property belonging to the succession of Bertrand Gravier, according to the *inventory*.

Now what appears to have been adjudged to John Gravier by these documents? All the estate of his brother which was put into the inventory. What was put in the inventory?—the plantation, deducting the lots which were sold.—If the batture was a part of the plantation of B. Gravier, and if at the time of his death it was not sold, it belonged to John Gravier by the adjudication. But it ought to have been particularly specified in the inventory under penalty of confiscation.—It was just as necessary to insert the cypress-swamp, the wood, the meadow, and the rice field, as the batture; they were all equally parts of the plantation or farm, and though there are more than five hundred battures in the country, yet not in a single instance have any of them been inventoried separately from the farm to which they belong. The remainder of the plantation after deducting the lots sold, being then adjudged to Gravier, he was as much entitled to it under this conveyance, as to any other acre of land which it contained. But whether purchased by John Gravier or not, he had a right to sell his own third, and the co-heirs by their ratification have confirmed the sale for the residue. So that this objection is at rest, and we are now prepared to accompany Mr. Jefferson in his attempt to shew, not that the property belongs to another, but that it does belong to the United States, and that he had a right forcibly to seize it. But we are not so soon to be gratified; more prejudices are to be excited against the in-

jured proprietor;—another attempt is to be made, to show that his title is defective,—as if changing the party injured would lessen the offence. The title of Mr. Delabigarre, under which I claim a part of the lands, is said to be illegal, and of course, I suppose, void. But if so, does it vest any title in the United States; admitting that he were guilty of champerty, no new title would thereby accrue to them. The parties might be punishable, the deed might perhaps be declared void, but the United States acquire no rights which they had not before. Why then is the subject introduced? Because, in a bad cause, it is easier to address the passions and prejudices of men, than to consult their reason, or convince their understanding;—because it was supposed that the name of Mr. Jefferson would give new currency to the forgotten calumnies of New Orleans; and because some men can never forgive those whom they have injured.

The repetition of this charge might be excused, if it had not before been repeatedly resorted to—if Mr. Jefferson had not seen the refutation, and if he had not the evidence of the falsity of the charge before him.

It is begun by an allegation (page 11), "that for six years after his purchase, J. Gravier never manifested a symptom of ownership until Mr. Livingston's arrival from New-York;" and that then Gravier received his inspirations that the beach (as he chooses to call it) was his; that I tempted him to lend his name to the suit, but really prosecuted it for my own benefit. This charge is made with an air of levity, and a wretched attempt at wit, which could proceed from no one but a man hardened by repeated attacks on his own character, into a total insensibility for that of others. *I first gave the idea to Gravier, that the property was his!*—yet ten years before my arrival, his brother had, by four several recorded deeds, disposed of different parcels of it;—and Mr. Jefferson, who makes the charge, knew this fact. *I first stirred up a dormant claim!*—yet I did not arrive until the 7th day of February; and in December preceding, a square of five hundred feet was begun to be *inclosed* with a levée and ditch,* and Mr. Jefferson had evidence of the fact. *I first gave Gravier an idea of his claim!*—and yet previous to my purchase, he had agreed to sell it to Mr. Clark and Mr.

* See Appendix, No. I

Morgan: and Mr. Jefferson had this evidence of the fact, that I had published it at the place where both those gentlemen live, and that it was never contradicted.* What does he oppose to this mass of proof? Nothing but an assertion, that he "might safely presume that Gravier's work was not begun, while the French governor thought the country belonged to his master," and most probably not until after my arrival. Now, he knew, that I had arrived in February, 1804, and he acknowledges that the inclosure was ordered to be destroyed on the 22d of that month; —so that Mr. Jefferson thinks it probable, that arriving in New Orleans on the 7th day of February, I should immediately find out Gravier, inspire him with so much confidence, as that at my persuasion, he should set up a most unfounded claim; proceed to assert it, by making at a great expense, a ditch and embankment round a square of five hundred feet, that is to say, two thousand feet of levée; and that this plan should be formed by a perfect stranger in the country, communicated to a man he had never seen before, and that the whole should be executed in fourteen days from the time that he first touched the shore. This, Mr. J. thinks so probable as to counterbalance oaths, records, and the silent assent of those most conusant of the fact,

* Since writing this passage, I have obtained the following certificate and letter, which place the fact beyond dispute. Mr. Morgan was about that time a judge of the inferior court, and has since for many years been a member of the city council.

"I hereby certify, that I had agreed to purchase, together with Mr. Benjamin Morgan, from John Gravier, the batture in front of the suburb St. Mary, prior to the purchase thereof by Peter Delabigarre, in the year 1804. That we had agreed on the price (ten thousand dollars), but that the bargain was not carried into execution, as Gravier had during my absence from the city, sold to Mr. Delabigarre.

December 17, 1812. (Signed) DANIEL CLARK.

New-Orleans, March 2d, 1804.

DANIEL CLARK, Esq.

SIR,

I expect in your absence to complete the purchase of the strip of land adjoining the river, from the upper line of the city to the street, passing by Girod's estate in the suburb, and I pray you to give me written directions where to receive money for your half of the first payment.

I am respectfully,

Yours, &c.

(Signed) BENJ. MORGAN.

and most interested in contradicting it; and thus he uses the influence of his late exalted station, to perpetuate refuted calumnies, and stigmatize the character of a man, whose fortune he had wantonly ruined.

The contract between Mr. Delabigarre and Gravier, is next the subject of attack. It is called *ostensible* only, and the purchase made by it, *a pretended one;* and the reasons given for it are, that Gravier commenced a suit in his own name; that he afterwards made another deed, without any reference to the first; and that in the second deed there was a covenant, that if the suit should fail, the sale should be void. This clause, Mr. J. supposes criminal, both by the common and civil code, and that by the laws of the territory both deeds were void.

Of the first contract I was conusant; it was made by my advice, and immediately after it was concluded, I took an interest of one half in the purchase. If there be, therefore, any impropriety in the transaction, I must bear my share of the odium. Of the second, I was ignorant, until sometime after it was made, and the proof that I was so, is on the records of the superior court; for as soon as I discovered it, I thought it injurious to my interest, and commenced a suit against Mr. Delabigarre, to procure a title for my half of the first purchase.

But though I had a concern only in the first contract, I think both of them free from the stigma which is endeavoured to be attached to them.

Neither of these contracts was valid as a definitive sale, by the laws of the territory: Mr. J. has truly remarked, that by an edict promulgated by governor Unzaga, no lands could pass without an act before a notary; but though not good as deeds, they were valid as contracts, and on performing the conditions, the purchaser might enforce a specific performance, if in the mean time, the seller had not conveyed them by a notarial act to another. They formed, what in the French jurisprudence is called the beginning of proof in writing, which was admitted as introductory of other evidence, to prove the right, and is analogous to the equitable title of the English law. This accounts for the suit being brought in Gravier's name, and not in that of the purchaser. No suit could have been sustained in Delabigarre's name, for his title was not complete. The property remained legally vested in Gravier, though Delabigarre

might, on payment of the money, force him to convey. Therefore, no one but Gravier could sue.

But why was not the deed made in legal form? Why take a private deed, when a public act was necessary to convey the property? The reason is obvious: the owner would give no other. Mr. Delabigarre had not been two months in the country at the time of the purchase; his resources were unknown; it was therefore thought most prudent by Gravier, to make no definitive sale until one of the payments should be made. It is, I believe, no uncommon transaction in this or any other part of the United States, to make covenants for giving a title, on the payment of the price or a part of it; and this, though in terms a sale, yet legally amounted to nothing more. A conclusive proof that neither concealment nor impropriety was intended, is, that the transaction is stated by Gravier, in his petition against the corporation, wherein after alleging the disturbances of which he complains, he says "by reason whereof persons who have *contracted for the purchase* of parts of this land, refuse to pay." And this petition I drew, and signed as his counsel. Now it is inconceivable, that a man of common prudence, directed by a counsellor of common skill, would, if they were conscious of illegality or crime, furnish the evidence of it on record; and still more inconceivable, that the court to whom the petition was addressed, should not immediately punish so open a violation of the laws.

But there was no illegality. Neither the statute of Henry 8., to which Mr. J. refers, nor the text of the Roman law, forbid the purchase of any land of which the seller is in possession, although it should be known there are adverse claims. If it were so, it would be an offence to buy lands in a very great proportion of the state of North-Carolina, on account of lord Grenville's claim; in the Mississippi territory, on account of the English grants; in Kentucky, where, as I am informed, two, three, and sometimes four patents have issued under the state of Virginia, for the same land; and in every part of the state of Louisiana, where the titles are unconfirmed by congress. If this monstrous doctrine were true, every purchaser of a farm would be guilty of this crime, if the boundary between him and his neighbours was unsettled, although the person from whom he bought were in possession.

But what possession is necessary to justify a purchase? Clearly such a one as consists with the nature of the property sold; if of a house or other improved estate, actual occupation, or receipt of the rents and profits; but if uncultivated lands, nothing is required but that there be an ostensible title, and no acknowledged adverse possession. How often do we find the opposite claimants of tracts of uncultivated land selling their titles by regular conveyances without having ever seen the estate. Yet, who ever heard of a prosecution under this or a similar statute in such a case?

The proprietor of a farm, with a private road running through it, sells the soil of the road, and opens another equally convenient for those who have the right of way. He has never had any other possession of the road than that which all his neighbours have had, yet it is not selling a pretended title; the soil belongs to him, and he had that constructive possession which alone is consistent with the nature of the property.

To apply this to the present case: the public have a right to the use of the space between the levée and the edge of the water; (although, as will be clearly shewn in the course of this discussion, the soil remains in the proprietor of the adjacent land) until he incloses and protects it from the river;—'till then he has no exclusive right, and can no more interfere with the enjoyment of it by the public, than he could in the case put of the road; but neither in the one case nor in the other does it prevent his selling the property, subject to the right which the public have of enjoying it;—in the case of the road, until an equally convenient one shall be opened;—in the case of the batture, until the land shall be inclosed by a new levée, and when this is done, the right of public enjoyment will be restricted to the space between the new levée and the river.

John Gravier then succeeding, as has been shewn, to all the rights of his brother, the proprietor of the plantation, had a constructive possession of the part of it which lay between the levée and the river, in other words of the batture, he had the *same possession* which every proprietor of land on the river has to that part of it lying outside of the levée, and having this possession might sell it, without being guilty of any offence. The purchaser, it is true, must take it subject to all the legal rights of the public. What these are will be shewn in another part of

the inquiry;—here the only question is the legality of this purchase.*

But John Gravier had more than the constructive;—he had of a great part the *actual exclusive* possession, and was busied in the exercise of that right which the other proprietors had of advancing their levées nearer to the river. His ancestor had by public recorded acts, sold parcels of this very property to individuals ten years before. The purchaser, therefore, had a fair right to consider him as the true proprietor, even if he had notice of the claims of the corporation of New Orleans. As to those of the United States, no one ever heard of them until after the decision of the suit,—and surely a sale in opposition to the claim of the city only, could not be called the sale of a pretended title, when that very claim is acknowledged by the parties who set it up, to have been a groundless one, by the repeated resolutions they have since passed declaring the title to be in the United States, and not as they contended on the trial, in the city.

The nature of the claim set up by the city, even if a suit had been pending relative to it, would not have rendered the sale illegal. It was the claim of a servitude or right of common, as we should call it in English, to dig sand and lay wood, &c. on the premises. The land might certainly be sold with the risk of this claim pending over it,—or the vendor might take the risk upon himself, and if it were established, might lawfully agree to rescind the sale.

The first agreement for a sale, it will be recollected, is for only two thirds of the land, and contains no other condition than that of paying the money on the part of the purchaser, and that of warranty on the part of the seller. The second is dated nearly two years after, and is for a larger portion of land, including the first. It contains other covenants, and the circumstances which had occurred, rendered them not only legal but

* Conformably to this reasoning is the text of the civil law. *Rectè dicimus eum fundum* TOTUM *nostrum esse etiam cum ususfructus alienus est: cum ususfructus non dominii pars, sed servitutis sit: ut via, et iter.* Dig. 50. 16. 25.—Now if the *totum fundum* as the text expresses it, be mine, although another have the *usufruct* or a right of way over it, surely I may dispose of this which is so emphatically termed *all mine*, and *a fortiori*, I may dispose of it when the usufruct, or the servitude is only claimed, but does not exist in reality.

prudent. The suit had since been commenced, it had been long protracted; if the corporation established the servitude or right of digging for which they contended, the land would be nearly useless to the purchaser. He had, therefore, a right to guar against that event, by stipulating, that in case it happened, the deed should be void. But, in fact, this stipulation did no more than the law would have done without it;—if the claim of the corporation had prevailed, the purchaser might by the civil law, either have rescinded the sale, or sought a compensation in damages, at his option;—and surely no covenant can be called criminal, which only enforces an acknowledged principle of law. I had, as I have said, no agency in this second deed, nor any other interest in defending the conduct of those who made it than that which is naturally excited, in hearing the memory of an unfortunate man, treated with unmerited obloquy and con-contempt;—a widow* bereft of reason, two infant children (one of them blind) deprived of their bread, are not enough!—the reputation of their father must be wantonly and unjustly destroyed before the vengeance of this just magistrate is complete.—Parties, witnesses,—all who dare to complain of oppression,—or to prove its existence, must be involved in one general proscription, that the public may cease to interest themselves in favour of men who are represented as so unworthy of their sympathy. But the device is too stale to succeed with an enlightened—too odious to be favoured by a generous nation; and the mixture of jocularity and oppression which it exhibits only convinces us, that the most hateful traits in the tyrants of antiquity may sometimes be found united with an affectation of republicanism, and of a regard for the rights of man.

While on this subject, let me assure the public, that Mr. *Parisien*, who is most facetiously called a joiner by trade, and a comedian by profession, and who it is most charitably insinuated, was suborned to bear false witness to a most unimportant fact, was a man while he lived, of respectability and worth.†—

* The proceedings of the late president have actually produced this melancholy effect. The relict of the late Delabigarre is confined in a mad-house;—his two daughters depend on the benevolence of relations.

† It will hardly be believed that this serious charge should be made on hearsay only. Mr. J. never saw the testimony on which he comments with such severity. He has seen only an affidavit of a gentleman who says, that he *was informed* Parisien had given such testimony.

that Mr. *Sigur*, who is treated with the same levity, is one of the most ancient and respectable inhabitants of the country,—and that proof of these facts will be found in the Appendix.* It is no excuse for Mr. J. that he has heard what he asserts,—he should be certain of its truth before he gives it the sanction of his name.

Having thus, as he supposed, excited a sufficient degree of prejudice against his opponent, Mr. Jefferson ventures, but by cautious approaches, on something like a justification of himself.—We are first told that the judgment of the superior court in the suit with the corporation did not bind the United States;—and a page or two is gravely employed in proving, that none but parties or privies are bound by a judgment. This is undoubtedly true, and if the rage of making Latin quotations had not seized the author, he would without citing the *Codex*, have been content with my acknowledgment of it in my Address, p. 22, where I state that I sent on my *Examination*† with a view to *prevent* the United States from *ordering a suit*. That acknowledgment and this admission, however, are both founded on the supposition, that the claim of the United States is one they have IN THEIR OWN RIGHT and for their OWN USE;—but if, as I have since been convinced, those who made the claim on behalf of the United States, did it only as trustees for the original party in the suit, and for their benefit only,—then, I say, though not nominal parties, they are bound.—Nor shall the party really interested avail itself of a concealment of the trust, in order to procure a double trial on the merits. This subject will be more fully developed in another part of the discussion. I proceed with the pamphlet.—Having established to his own satisfaction, that the United States were not bound by the proceedings in the suit which had been determined, the most natural course to be expected, would be for the president to institute one to which they should be a party; but this was too much in the common line. Mr. Jefferson did not like "playing at *push-pin* with judges and lawyers," as he very elegantly terms it; the forms of law were too slow to satisfy his eager desire to do justice. There had been a commotion among the people,—there had

* See Appendix, No. II.

† *Examination of the title of the United States to the land called the Batture*, published afterwards with my address to the people of the United States, in the year 1808.

been an open opposition to the execution of the laws;—and he seems to have had a natural sympathy for those who were guilty of it. Profaning the sacred exertions of our first revolutionary patriots by an assimilation with his own agency in this paltry squabble, his imagination took fire at a striking similarity he discovered between the judgment in the case of the batture, and the Massachusetts port bill, between the opening of my canal and the "*occlusion*" of the Boston harbour,—he pants for the wreaths of Hancock, Adams, and Otis,—and he bravely determines to hurl all the vengeance of the government at the unprotected head of an individual, who had nothing for his defence but the feeble barriers of constitution, treaty and laws.

Popularity was to be gained, and of that kind which he loves the most,—the applause of those who were independent enough to resist the decree of a court, and set the authority of law at defiance.

In the pages which contain this part of the defence, we are presented with the circumstances which induced the president to take the measure of ordering me to be dispossessed by the marshal; and among them we find several documents which are dated at New Orleans, only thirteen days before the resolution of the privy council at Washington;—but this is a trifling obstacle to Mr. Jefferson. Let us suppose that he had before him not only all that passed at New Orleans up to the very day of the deliberation at Washington, but all the facts he cites as having taken place for years afterwards. Let him have the advantage of the whole, and see to what it amounts.

The first of these documents are letters from governor Claiborne, and the extracts that are given, furnish the true motives of his conduct. These letters inform him, that Mr. Livingston is disliked by the people, and that the decision of the court is very unpopular;—they seem too, to have given a true statement of some of the outrages that were committed in opposition to that decision. Here, then, was an opportunity not to be lost;—an unpopular man to be oppressed,—a popular claim to be supported,—and opposition to the laws to be rewarded. Governor Claiborne, it is true, had formed no conception of the mode in which this was to be done;—he hints in his letter at an old fashioned idea of "devising some means of arresting the judgment of the territorial court, and bringing the cause before another tribunal;"—but this suggestion did not coincide with the

ideas of the gentleman to whom it was made;—he is peculiarly unfortunate, although his *wish* is always for an investigation before the tribunals of his country, his *practice* is always to decline their jurisdiction, and he was prevented from following this judicious advice of governor Claiborne, in the same manner that we have seen him "*precluded*" from bringing the merits before the court at Richmond,—by his own act.

But it seems the case was urgent,—my works threatened to drown the city,—its peace could only be preserved by destroying them;—and the land in question was absolutely necessary for the use of the citizens. The president, therefore, was called on to interpose,—and he could not wait for the slow forms of law.—If these things were true, the public are yet to learn by what part of the constitution, the president is vested with the power to abate nuisances of his own authority, or whether the first magistrate of the union, is, *ex officio*, high constable of the city of New Orleans.—If any offence was committed against the police of the city, or of the river, and shores, Mr. Jefferson has shewn, that a remedy was provided by the territorial laws;—he has shewn, that the administration of justice was sufficiently vigilant, for he has recited a presentment against these very works.—Why, then, did he not trust that the people of New Orleans would have good sense enough, not to suffer themselves to be drowned, when they had the means of prevention in their power. If the public functionaries, who cannot, I believe, be taxed with partiality to me, had thought that they could have supported the allegations in the presentment, that presentment would certainly have been prosecuted. More than two months elapsed between the time of finding it, and the execution of the president's order. That presentment could have been brought to trial without delay, and if the facts were proved, the works would have been destroyed as effectually by the judgment of law as by any executive mandate. In that case, however, the court must have made it a part of the judgment, that the nuisance should be abated—an inconvenience which was avoided by the president's order, which only drove *me* from the property. The *nuisance* was suffered to remain, and for several successive years served as a safe harbour to boats, and has saved thousands of dollars to the public,—while a house which was also part of the *nuisance*,—has been usefully occupied as a

guard-house by the city. If, then, there were this danger of immediate inundation, from the effect of my works, there was no necessity for the interference of the president of the United States;—the great officers of state need not have been called from their respective departments, to deliberate on the weighty concerns of the police of New Orleans,—and the cabinet council of a great nation might, it must be confessed, at that period, have found objects much more worthy their attention. But there was no such danger, and I prove it from data given by the very work that contains the assertion.—The banks of my canal extended from the road 276 feet on the batture. The sides were twenty feet wide, and from four to six feet high. Now, if I calculate right, this forms a mass of 55,200 cubic feet, which would be displaced even if the river rose to the full height of the bank by the sides of the canal;—add the parts of the levée laid down on Mr. Jefferson's plan 990 feet long, by 6 feet high and 6 feet wide, forming 35,640 cubic feet, and we have altogether 90,840 cubic feet;—and the displacing this mass, Mr. J. thought put the city in such immediate a danger of inundation, that he states it as a reason for considering the case as one of extreme urgency. But we have seen that the works occupied a space of 90,840 cubic feet;—now, the river being 3600 feet wide, the length of the works 1066 feet, and the rise of the water 14 feet, we have for the increased column of water when at its highest opposite those works, $3600 \times 1066 \times 14 =$ 53,726,400 feet, which being divided by the mass of the work, to wit, 90,840, we have, leaving out fractions, 591; that is to say, that the works displace a quantity of water equal to $\frac{1}{591}$ part of the column opposite to them;—and of course, could only raise the water in that proportion, that is to say, two lines and $\frac{498}{591}$ parts of a line.

This calculation is made on the idea, that the works were erected in the current of the river, but the reverse is the fact. From the point A, to the lower part of the town, (see plate No. 3), there is no current whatever but an eddy, and therefore no work but such as project further into the river than that point can at all change the current. But let us examine by what process of calculation Mr. Jefferson draws the conclusion, that these works would "raise the water three feet at least, and would sweep away the whole levée, the city it now protects,

and inundate all the lower country." (Jeff. p. 20.) In the first place, he encreases the projection of my embankment from two hundred and seventy six feet, as he states it in the preceding page, to two hundred and fifty yards. Then he says, the river being twelve hundred yards wide, this forms nearly one fourth of this width, and as the river rises twelve feet, when it has its whole breadth, if you reduce it one fourth, the water must rise in the same proportion; but three feet is to twelve feet what two hundred and fifty yards is to the whole breadth of the river; therefore the water will rise three feet,—*which was to be demonstrated.* It must be confessed that this is most admirably calculated. It is a pity to spoil so fine a piece of demonstration; but there are a few corrections which must be made, both to the proposition and the proof.

First, we must in point of fact reduce the two hundred and fifty yards to two hundred and seventy-six feet, which, instead of a fourth of the breadth of the river, is, according to his calculation, not quite one twelfth. Then instead of three feet, I should overflow the levee but one foot, which, by the preceding calculation, must be reduced to a little more than two lines; and in order to effect even this, I must deprive the water of its fluidity, or else, according to the usual course of things, it would, after passing the end of my canal, spread itself over its usual surface; for the plan exhibited by Mr. Jefferson, shews that my lower levee was not connected with the sides of the canal; unless therefore he could contrive to heap the mass of water, displaced by my works, on the surface of the river, and retain it there, he can never make it rise even to the fractional part of an inch, as I have shewn; and this even if the works were erected in the current. But Mr. Jefferson's manuscript affidavits, which he cites so frequently, if they say any thing on the subject, must say what I have before asserted, that the whole of that part of the batture which is inundated is in an eddy, and that consequently the current is no wise affected by any thing that is done there. The calculations, then, are as erroneous, as the facts which he assumes are unfounded. The batture was formed long before my works, or any others, were thought of in that place. Its progress has neither been hastened nor retarded by any thing that has been erected there. The puny works of man can neither arrest nor hasten the progress of those

changes which are produced by natural causes, impelling this mighty mass of waters. An attentive observer may perceive these causes, but as yet no human effort has been able to prevent their effects. The river, on an average, is twenty fathoms deep. The weight of this prodigious column of water, borne with a current of three miles an hour against a loose soil, undermines it at a depth which no piles can reach; and whole fields are sometimes precipitated at once into this abyss. When these excavations take place on a point, the batture formed by the eddy below it, becomes itself exposed to the depredations of the current.* In the mean time new eddies are formed; they become the agents of new deposits, and places which only a few years before were covered with twenty fathoms of water, begin to shew their heads above the stream. Until therefore some such change shall happen in the current of the river, above the town, as shall throw its force upon the batture of the suburb St. Mary, it will go on increasing in length down the river opposite the town, and in breadth towards the other shore. This progress was foreseen by Mr. Lafon, an engineer of great professional skill, in the year 1804, three years before my works were begun. The city council, alarmed by the progress which the river then made in undermining the levee a little above the government house, in the centre of the city, requested Mr. Lafon to devise some plan for defending it. He made them a very able report, which I am sorry the limits of my work will not permit me to insert, in which he tells them, that any work will be expensive and useless; that, by the natural progress of the river eating out the opposite bank, and filling up the one above the town, the batture of the suburb St. Mary will extend itself opposite the city, and that the course of the current will then strike below the town. This has exactly happened, and the effect which Mr. Jefferson and his manuscript affidavits ascribe to my levee, is found to be produced from natural causes, foreseen and predicted three years before my works were begun; and there was no danger of any of those dreadful consequences which Mr. Jef-

* The batture in question bears unquestionable proof, in its physical conformation, of having undergone the change here described. In digging my canal, the stumps of a grove of large trees, three feet in diameter, were found in their natural position, rooted in the ground, twelve feet below the surface.

ferson has conjured up to justify his oppression. There was not, I affirm, even any inconvenience to be apprehended; on the contrary, I am ready to prove, whenever an opportunity is given me, that the beauty of the city, and the health, convenience and commerce of its inhabitants would have been greatly encreased if I had completed my plan; and, in the mean time, I offer the certificates of the harbour-master, the wardens of the port, the commander of the naval force of the United States on this station, and all the masters of the vessels in port at the time it was taken; all these speak a language which shews the nature of the information on which the late president acted, and must convince the world, that even the pretence of public inconvenience was wanting, to justify the flagrant outrage.* But it seems the peace of the city could not be otherwise preserved. Mr. Jefferson says, page 20, that he was "*urged* by the repeated calls of the governor, who declared he could not be responsible for the peace or preservation of the place, by the tumults and confusion in which the city was held." We must remark that we are not favoured here, as in the former page, with an extract of these *repeated* calls; it is given as the substance of sundry letters. I wish they had been produced, because I cannot well conceive that governor Claiborne, after having on the sixteenth of September declared that every thing was quiet, and when in fact every thing was so, should write, that he could not answer for the *peace* or even the *preservation* of the place—that he should talk of *tumult* and *confusion*, after he had told us, that every thing was in a state of tranquillity; and that he should urge the president to take violent measures, when his other letters, during the continuance of the tumult, only advise a revision of the sentence in some other tribunal.

These dangers, however, (whether real or imaginary the reader may now judge), were sufficient in the president's opinion to justify the calling of a cabinet council, and we are now prepared to examine with due respect their important deliberations.

We are first told: "They took such views of the whole case, as the state of their information then presented." This I understand; but when Mr. Jefferson tells us in the next sentence that

* See Appendix, No. 3.

he will "develop *them* (that is the views) *in all the fulness of the facts then known*," I confess I am utterly at a loss to discover his meaning. What we are to understand by "*developing views in all the fulness of facts*" either known or unknown, I confess passes my comprehension; but when he adds "*and of those which have since corroborated them*," I begin to discover that this is a phrase purposely rendered obscure, that "seeing we might not perceive, and hearing we might not understand."—The council had but very scanty materials for this important proceeding.—It would not do therefore to give a simple sketch of their views, from the proofs *then* before them; four years were to be employed in fostering prejudices, in collecting calumnies, in making *faithful* translations and *learned* extracts, in procuring affidavits, and in all the other *honourable* means I have detected, in order to bolster up this weak, wicked, and unconstitutional measure. And they were to be introduced by an obscure phrase, which would lead cursory readers to believe that the cabinet had all those arguments, facts and laws before them, at the time of their deliberation.

Let us give them the advantage of all that the diligence, ingenuity, and influence of the late president has heaped together, for their support, and see on what grounds the determination stands.

The preliminary decision, that the question was to be determined by the French not by the Spanish laws, was erroneous; but, as both codes are equally favourable to my argument, I should spend no time in refuting it, if it were not to shew, that by a kind of fatality attached to this proceeding, it was conceived in false principles, and has through every stage been marked with error.

The principle that the laws of a ceded country do not change by the mere effect of the transfer, is true as to those laws which affect the inhabitants in their relations to each other; but is it so with respect to those fundamental principles which regulate the prerogative of the sovereign, and the right of the subject? It appears to me they must of necessity be changed by a cession;—that, for instance, which was made of the province of Louisiana, absolved the inhabitants from the duty of allegiance which they owed to France, and made them, by the very act, subjects of the crown of Spain. The same relation was created

between them and their new sovereign, which subsisted between him and his other subjects. If that relation gave rights to the new sovereign which were not due to the old, the people were bound to submit; on the contrary, if the people to which they then became united had greater privileges, these were immediately communicated to them, and the new sovereign could not, without injuring the fundamental laws of the kingdom, attach to himself greater prerogatives in this, than he had in his other colonies; and even if the right of alluvion were inherent in the crown of France, it may reasonably be doubted whether that right passed by the transfer of the province to the king of Spain. If a province of France should have been, under the old monarchy, ceded to Spain, so as to be incorporated with that kingdom, I am inclined to think that the *droit d'aubaine*, and other local rights of the crown, would not by the very act of transfer be vested in the king of Spain.—I do not urge this argument as conclusive, but I think it has some weight, and deserves abstractedly more development than its importance in this inquiry will excuse.

But whatever may be thought of these principles, there is another more generally acknowledged, which applies directly to the case;—it is, that the ancient laws of a ceded country are in force, only until the new sovereign shall direct them to be changed.* This principle is not denied in the work to which I reply, but we are told that the sovereign never made such an expression of his will in Louisiana, and the very instruments, on which I might rely (even without other proof) to evince the change, are cited to shew that there was none.

O'Reilly's proclamation in 1769, it is acknowledged, changes the *form of government*. This, it is said, might be done while the system of law remained; this is true, but what do we do with the remainder of the sentence? It is not only the form of political government (Jeff. p. 22) but the "*administration of justice* prescribed by the wise laws of Spain," which are declared to be introduced. The proclamation details the new offices and the duties of the officers, and it is accompanied by *instructions* "for the instituting and carrying on civil and criminal suits, and rendering ordinary judgments conformably to the *Recopi-*

* 1 Blackstone's Com. p. 107.

lacion, (or *Digest* of the laws) *of Castile and of the Indies*, for the government of the judges and parties, until the Spanish language shall be more familiar, and a more extensive knowledge of those laws shall be attained."

This proclamation and the instructions both refer to the laws of Spain as forming the code of the country, the first of these instruments by general words, the second more particularly, to the laws of Castile and the Indies, of which the *instructions* contain such an abstract as was required for daily use.—But neither the proclamation nor the instructions were necessary for the introduction of the Spanish laws. A code had been long prepared for the government of the Spanish colonies in the *Indies*, by which name they designated all their American possessions. It is called the "*Recopilacion de las Leyes de las Indias.*"* It introduces the law of Castile, those of the Partidas, and of Toro; that is to say, the whole body of the laws of Spain, in all cases not provided for by the laws of the Indies,† and declares that the laws of that collection shall prevail in all the Spanish colonies, as well those then established, as those which might in future be discovered or established.

The moment then, that Louisiana became a Spanish province, it was subjected *de jure*, to the system of laws I have described; and *de facto*, none other has had the slightest authority since the transfer. Whence therefore Mr. Jefferson has derived his idea that the French and Spanish laws were confounded in practice, I know not; certain it is, that in all their tribunals none but Spanish laws were cited by the advocates, or admitted by the judges; that the assessors by whose advice all decrees were rendered, were Spanish, not French lawyers; that in their official opinions, they referred only to the laws of Spain and the Indies, as their rule of decision; and that "the changes after 1769, were not, as is supposed, chiefly in the organization of the government, but that they also pervaded the whole system of jurisprudence."

It is admitted that the French laws were in force at the time of the sale of the Jesuits' property; but it is not admitted that, as

* Leyes de Indias, Vol. I. lib. 2. tit. 1, laws 1st and 2d.

† It establishes for the government of all those possessions a royal council called the *Council of the Indies*.

Mr. Jefferson alleges, the question "*was then generated.*" The *generation* of the question could not have taken place before the property existed. Now there is not the slightest evidence of any increase by alluvion, between the year 1763, the time of the sale of the Jesuits' property, and 1769, the period of the transfer of the province. On the contrary, Mr. Laveau a witness for the city declares "that at the time of the sale of the Jesuits' property, vessels came to the levee, opposite to Madame Delor's,* and that there was then no batture from thence to the city."

Whatever unanimity therefore might have reigned in the cabinet as to the laws they were to be governed by in their ex parte trial of my title, the impartial reader will, I think, perceive at least some doubts as to the correctness of this preliminary decision. These doubts will be increased, when he peruses the report of the attorney general, a member of that cabinet. With a candour which does him honour, he says "the facts from which alone the law can arise, are much controverted. These must be *correctly ascertained* before a *satisfactory opinion* can be formed,"—and again, "All the light afforded by the statements and papers on each side, *was not deemed sufficient* to ascertain with precision the facts. *The law itself which should furnish the rule of determination, was also a matter of controversy;* perhaps it might be considered not improperly as *foreign laws*, and in some degree at least the subject of proof."—Now, if the attorney general in June 1809, thought the facts uncertain, and the law a matter of controversy even after all the light afforded by the statements and publications, it is a little singular, that Mr. Jefferson should tell the world there was but one opinion in the cabinet of which this very attorney general was a member in the year 1807. It is true, the attorney general adds in this report that he adheres to his former opinion. But what was that opinion? Merely, according to his own expression (Correspon. p. 8), a concurrence with Messrs. Derbigny and Gurley, *provided the statement of facts furnished and officially laid before him was correct.*" But it is evident from the parts of the report I have just quoted, that he considers the law of France among those *facts*, since after two years consideration of the subject, he treats it as a foreign law, and calls for further

* Now Duplantier. See plate No. 2.

proof of its provisions. *He* makes no vain pretence of being deeply versed in a foreign system of laws, to which his studies had not been directed. Fortunate would it have been for me, and honourable to the country, if others had rendered equal justice to their own ability to decide.

Mr. Jefferson, however, had no doubts, and his council, he says, were unanimous. On this co-operation of the council, I shall only make this observation: that in all my inquiries, in all my correspondence on this subject, it was never hinted at; nor had I the slightest suspicion of the fact, until I saw it asserted in the publication before me. The member of that council who told me that the order was given in the execution of a personal duty devolved upon the president, in which he had not participated; that influential member of the cabinet, as well as others implicated in this charge of unanimity, owe it to themselves to deny the imputation. To me it is of little moment with whomsoever the measure originated, or whoever sanctioned it. I am prepared to shew, that it is illegal, unconstitutional and oppressive.

All who have written on this subject in opposition to my claim, have acknowledged that by the laws of Spain, alluvions belong to the proprietors of the adjacent lands. It was necessary therefore to abandon this point, or to find out some system which would vest property of this description in the sovereign power.

The inaccurate expressions of some French jurists, and the grasping provisions of some French edicts, together with the circumstance of this province having once been under the dominion of France, pointed out the jurisprudence of that country, and the laws of France were resorted to; with what success, may be determined by those who will take the trouble of refering to the former discussions of this subject, particularly to the learned arguments of Mr. Duponceau, in two publications, which still remain without refutation.

Having repelled all the skirmishing attacks which have hitherto impeded our progress, we at length approach the body of Mr. Jefferson's defence. It consists of the following points:

I. *That alluvions of navigable rivers, by the law of France, belong to the king, and that those of the Mississippi have been transferred, with the other sovereign rights, to the United States.*

II. *That the right of alluvion accrues only to rural, not to urban possessions.*

III. *That the property in question is not an alluvion, but part of the bed of the river, which belongs to the sovereign.*

IV. *That the use I made of the property was dangerous to the safety of the city of New Orleans, and an infringement on the public right to navigate the river; that my works were a nuisance, and that the president had a right to abate it.*

In discussing these points, I feel an embarrassment from the reflection, that almost every thing I shall say has been anticipated, either in my own publications, or those of the learned counsellor and excellent friend, whose disinterested zeal has advocated my cause; and I cannot but admire the patient perseverance with which Mr. Jefferson consents to transcribe the oft repeated authorities, to rally the broken sophisms, and once more array in his service the ten times refuted arguments, which, at different periods, have been worn out in his defence. I will not, however, be outdone in the contest. I will revive the charge, as often as he shall choose to repeat the defence; nor will I cease to expose his oppression to the public, until I have an opportunity of arraigning him before another tribunal.

I. Let us begin then with the first ground of defence, that *alluvions of navigable rivers, by the laws of France, belong to the king, and that those of the Mississippi have been transferred with the other rights of sovereignty, to the United States.*

The Roman law, Mr. J. acknowledges, (p. 36) gave alluvions to the adjacent proprietors, as well as the sand-bars, shoals, islands, and even the bed of the river, when deserted; but the *established laws of France*, he contends, differed in all these particulars; and, as usual, Pothier is brought forward to bear the burthen of the contest. He is the only author of any reputation in France, who advances this doctrine; for Guyot, Ferriere, Denizart, and the author of the Title Jurisprudence, in the Encyclopedia, who are quoted by Mr. J. support, as I shall shew most expressly, the right of the adjacent proprietors. If Pothier is to be understood in the sense in which he is quoted, (which I must confess is the most obvious meaning of the passage) he is then contradicted

by the venerable sages of French jurisprudence who preceded him, and is followed by no one writer of note. This is so extraordinary a circumstance, that I sought, by a reference to the context, to shew that he was guilty of an inaccuracy of expression, rather than an error in principle.* But if my attempt to

* On this passage of Pothier, I made the following observations in my *Examination*, pages 19 and 20: "The only remaining authority is that of Pothier. I "confess that the part cited, would lead the reader to suppose that this "writer meant to decide the question in all cases of navigable rivers; but "a closer attention will perhaps discover an inaccuracy of expression, or an "error, unavoidable, in some instances, even by the most correct writer, "whose attention is turned to so many points as are embraced by the valua-"ble work of Pothier."

"I apprehend that what is laid down here as a general proposition, appli-"cable to all navigable rivers in France, is true as to those only, (and this "may be the case perhaps with the greater number) where the grants have "not been bounded by the river, but by a fixed front boundary. I believe so, "because if the doctrine of Pothier were understood in the unqualified sense "in which it is quoted, the other writers whom I shall cite, and who all, without "exception, give a contrary opinion, would at least notice that of so celebrated "a writer, if they supposed it differed from theirs on so important a point.

"I am also inclined to this solution from the passage which follows, in the "160th article, where he gives the reason why, by the Roman law, the alluvion "belonged to the adjoining proprietors."

"It was (says he) by a kind of right of accession, that, according to the "Roman law, the riparious proprietors had each one in his own right, the "property of the islands which were formed in the river, and even in its bed, "when the river abandoned it to take another course."

"The inheritances of these proprietors having towards the river an unlimit-"ed extent, and having no *other bounds but the river*, and *which comprehended* "*even the shores, and all which was not occupied by the river;* the bed, which had "been covered, when it ceased to occupy it, was deemed to have made a part "of those inheritances, and to be an accession to them. It was the same thing "with respect to the islands which were formed in the river; these islands "being nothing else but a part of the bed of the river, which it had ceased to "occupy."

"By the French laws, the navigable rivers belong to the king; the islands "which are formed within, as well as the bed when it is abandoned to take a "new course, belong to the king; the proprietors of inheritances on the bank, "cannot at all pretend to it, *unless they shew titles of concession from the king.*"

"From these citations I think it appears, that Pothier makes the right of "alluvion to depend on the fact of the concession or grant being bounded by "the river, since he gives the existence of such boundary as a reason why, "under the Roman law, the proprietor was entitled to the alluvion, and de-"clares that unless he has a similar concession, he is not entitled to it by the "French law. I have endeavoured, I know not with what success, to reconcile "Pothier with the other French writers, some prior and others subsequent "to his work: every one of whom, at least all that I have been able to consult,

reconcile him to the body of the law be unsuccessful, we must not, with Mr. Jefferson, make the law bend to his authority. Let us examine the other writers who are relied on; they are *Guyot*, *Denizart*, *Ferriere* and the *Encyclopedia*. It would have been but candid in Mr. Jefferson, when he cited Guyot, to have told his reader that the same author, whose doctrine, under the word *island*, he quotes, had, under the word *alluvion*, the one now in question, expressly declared, that the "dispositions of the Roman law were observed in France, except on the rivers Doux and la Fère." The whole passage is quoted in my Examination, (p. 21). Mr. J. therefore would have had some better title to the character of a fair disputant, had he adverted to it.

Ferriere and Denizart, on whom he also relies, say no more, even in the passages cited, than that augmentations, *formed suddenly and all at once*, belong to the king; a position I am not interested in denying, and which I had transcribed with the rest of the article, which Mr. J. for good reasons, has not chosen to quote. Denizart is as follows:

DENIZART: *title* ALLUVION. *Vol.* 1, *page* 74.

"I. L'alluvion est un accroissement qui se fait insensible-
"ment, et peu à peu, sur les rivages de la mer, des fleuves et des
"rivieres, par les terres que l'eau y apporte."

"II. Lorsque par *alluvion*, un héritage se trouve insensible-
"ment accru, et plus étendu qu'il ne l'était, l'accroissement ap-
"partient au propriétaire, et celui dont l'héritage est diminué
"par cette voie, ne peut pas revendiquer ce qui s'en manque."

"Cette maxime, qui est puisée dans le droit Romain, A LIEU
"DANS TOUTE LA FRANCE, excepté en *Franche comté*. On y
"dit communément au contraire que la riviere du Doux *n'ôte ni*
"*ne baille*. Ainsi *l'alluvion* n'est point dans le cours de cette
"rivière, un moyen d'acquérir. Voyez la remarque de Du-
"moulin."

"Il faut encore excepter la rivière de *Fère*, qui, suivant une
"coutume locale d'Auvergne, *n'ôte ni ne baille*, c'est á dire, que
"lorsqu'elle prend d'anciennes possessions par inondation ou
"autrement, petit à petit, deça ou delà l'eau, il est permis à celui
"qui perd de suivre sa possession et de la revendiquer."

"agree in the doctrine, that the proprietors of land bounded by a river,
"whether navigable or not, is entitled to all the increase that may be produced
"by alluvion; but that *attérissement*, a word peculiar to the French jurispru-
"dence, belongs, in navigable rivers, to the king."

" III. L'augmentation qui arrive dans un héritage par *allu-*
" *vion*, est une seule et même chose avec l'héritage accru:
" *(fundus fundo accrescit, sicut portio portioni;)* il en prend toutes
" les qualités accidentelles de fief et de roture, de propre et
" d'acquêt; Il est sujet aux mêmes charges, fussent-elles d'usu-
" fruit et de substitution."

" IV. Il n'en est pas de même d'un accroissement subit,
" occasionné par un débordement, ou par quelqu' autre cas for-
" tuit: la portion de ce terrain pourrait en ce cas, être réclamée
" par le proprietaire. Voyez la coutume de Bar."

" V. La maxime est d'ailleurs affermie par l'arrêt rendu au
" rapport de Mr. l'abbé de Vienne, en la quatrième chambre
" des enquêtes, le 15 Avril, 1744, entre le Marquis de Bouzols
" et Mr. de Chamflour, conseiller en la cour des aides de Cler-
" mont, rapporté par Guyot, Traité des Fiefs, tome 6, chapitre
" *des Rivières*, page 673, n. 10; et par arrêt du Mercredi 22 Fe-
" vrier, 1769, rendu en la grande chambre, conformément aux
" conclusions de Mr. Seguier, avocat général, la même chose
" a été jugée. La sentence qui avoit ordonné une visite des
" lieux a été infirmée, et il a été ordonné que par enquête re-
" spective, il serait verifié si le changement du cours de l'eau,
" sur le rivage de la mer, avoit été subit ou insensible. Mr.
" Lochard plaidait pour le chapitre de Luçon, et Mr. Caillou
" pour le sieur de Champagné."

" VI. Bourjon prétend que ce qui accroît par *alluvion* appar-
" tient au seigneur haut justicier; mais ni son opinion, ni l'avis
" des auteurs qu' il cite, ne sont suivis dans l'usage. Voyez la cou-
" tume de Normandie, art. 195, l'article 268 de celle d' Auxerre,
" l'article 154, de celle de Sens, et celle de Metz, tit. 12. art. 28.

" VII. Les *attérissements* formés subitement dans la mer ou
" dans les fleuves et rivières navigables, appartiennent au Roi,
" par le seul droit de sa souveraineté. Voyez la déclaration du
" mois d'Avril 1683, et Mr. Le Bret, de la souveraineté Liv. 2.
" Chap. 16; et les édits des mois de Decembre 1693, et Fev-
" rier 1710, concernant les attérissements, isles et islots. On
" trouve ces deux édits dans le Recueil de Neron, Tome 2."

Ferriere is not less express. " The disposition of this sec-
" tion," (that of the Roman law, Inst. Lib. 2, tit. 1, s. 20, *de alluvione*) " is observed among us."—And the whole passage from the Encyclopedia, of which a shred is given by Mr. J. reads thus:

"Alluvion is an increase of the ground, which takes place by "slow degrees, on the shores of the sea, on the borders of "*fleuves* and rivers; occasioned by the earth which the water "conveys to it, and which becomes so consolidated with the "contiguous land, that it forms a *whole with it—an identity.* "The name of alluvion is also given to those lands which are "slowly and imperceptibly left uncovered by the water.

"The Roman law places alluvions in the number of the means "of acquiring according to the law of nations, as being a kind "of accession; that augmentation being operated in a slow and "imperceptible manner, remains to the inheritance to which it "is found united.

"The portion which is thus added insensibly, is not consi- "dered as a new land, it is a part of the old which becomes pos- "sessed of the same qualities, and it belongs to the same mas- "ter, *in the same manner as the growth of a tree forms part of* "*the tree, and is the property of the proprietor of the tree.* "That right of increase by alluvion is grounded in the maxim "of law, which bestows the profits and the advantages of a "thing, to him who is exposed to suffer its damages and its "losses.

"THE REGULATIONS OF THE ROMAN LAW ON ALLUVION, "ARE GENERALLY FOLLOWED IN FRANCE. The *coutumes* of "Metz, Sens, and Auxerre, have on that subject precise regu- "lations, which form their common law.

"But the province of Franche comté must be excepted, where "it is established as a maxim, that the river Doux neither gives "nor takes away;—that is to say, that the person whose inheri- "tance is diminished by the inundation of the river, may in- "demnify himself by possessing himself of the land which it "has abandoned.

"The same thing takes place on the inheritances bordering "on the river Fère, in Auvergne, where the local *coutume* esta- "blishes the same right.

"The alluvions which the sea produces on the lands which it "bathes, also belong as a right of increase, to the proprietors of "those inheritances, who may also make levées or dykes, to "secure them.

"We must observe, however, that to acquire by right of al- "luvion, two conditions are necessary.

"FIRST.—That the increase should be made slowly and im-
"perceptibly, in such a manner that it cannot be discovered in
"what time each part of the alluvion has been formed to, and
"consolidated with the inheritance.

"SECOND.—That the inheritance by virtue of which the right
"of acquiring by alluvion is claimed, be contiguous to the river,
"in such a manner that the bed on which it flows, seems as it
"were, to be a part of the same inheritance;—for, in case it
"did not bound exactly to the river, and it was bounded by a
"causeway or by a road, the parts left uncovered by the river
"between its bed and the road, cannot belong to the proprietor
"of the inheritance situated on the other side of the road. Those
"lands belong to the king in navigable rivers, and to the feudal
"lords, in those that are not so."

Thus we see, that out of five writers on the French law, cited by the late president, four directly oppose his doctrine, and are made to favour it only by that ingenious and novel device which makes the scriptures declare "*there is no God.*"

After laying before the public, for the second or third time, the whole of these texts, of which partial extracts are given by the gentleman with whom I contend, I pause to ask whether a perusal of the whole does not give a different idea from that conveyed by the extract?—Whether it does not give an opposite idea?—Whether the whole text was not under his eyes when he wrote, and had not been successfully quoted before, to answer and explain the passages he cites?—An affirmative answer (and no other can be given to these queries) must involve Mr. Jefferson in the reproach of endeavouring to deceive the public, by a partial quotation of authorities, a conduct which would not be tolerated by any tribunal, still less by that of the public, to which he has appealed.

Having shewn that all the elementary writers, save one, which have been relied on, prove the reverse of the doctrine for which they were introduced, let us now examine the authority which we are told is to "*put aside all further question, as to the law of France on this subject.*"—The edict of Louis the XIVth, of the 13th of December, 1693.

It is, however, a little extraordinary, that during the century which has elapsed since this *decisive* decree, but one writer of any note in the whole kingdom can be found, whose doubts

have been "put aside" by its provisions, and that *not one* tribunal has decided in conformity with the construction now put upon it. This edict has been so often pushed forward to bear the brunt of the controversy, that I am tired of referring to it, and shewing that neither its declaratory nor enacting clauses warrant the conclusion drawn from it.

The first rule in construing statutes, is, to examine how the law stood prior to their being made.

The only sources from which we can draw a knowledge of this point, are statutory laws, elementary writers, or decisions of courts.

Positive law is not pretended to exist, or the edict would have been produced instead of the one which is referred to.

The only elementary writers cited, who wrote prior to this edict, declare, that alluvions belong to the adjacent proprietor, though islands and increments formed in the beds of rivers, by sudden changes, belong to the king, and not a single decision either before or since has been discovered vesting them in the sovereign. We may fairly, then, take it for granted, that at the time of the rendering that edict, the fundamental law of France gave alluvions to the proprietors of the land on which they were formed.

Now, let us examine whether this edict either could change or does purport to change this law.

We have seen, that as the law stood before the edict, islands and increments formed in the bed of a river, detached from the shore, belonged to the king; but, that alluvions formed imperceptibly on the bank, belonged to the private proprietor.—Now, if the edict intended to make so serious a change in the laws of the country, it would have been done by express terms, and in the enacting part of the statute. But the statute in question, in its preamble or declaratory part, asserts, that the king has a right of property *on* (*sur*) (which is improperly translated *in*, by Mr. Jefferson) on all navigable rivers and *fleuves* (a term meaning a navigable river falling into the sea, for which we have no equivalent) in the kingdom, and consequently to all the islands, mills, ferries, sudden *accumulations*, (*attérissements*)*

* "Nous appelons attérissement le canal et le lit que la riviere a *tout d'un coup* quitté."

We call *attérissement* the channel and bed which the river hath *all at once* quitted. 2 Ferriere on the Inst. 45.

and increments formed by the said *fleuves* and rivers.—That this right being *incontestably established* by the laws of the state, as a necessary consequence and dependence of his sovereignty, the kings his predecessors and *himself*, had ordered researches to be made as to the isles and increments formed THEREIN.

In all this, I see nothing but an assertion which I am not interested to deny, that the laws of the land gave *islands* and *attérissements* to the crown, when formed in the channel of navigable rivers. But it is said, p. 33, that the word *accroissement* (increment) is also used—that this is a generic term, of which alluvion is a species, and that therefore the edict comprehends it.

But where there are two species of increment, to the one of which the king has a right, and to the other he has none, would it be a fair construction to say that the use of the generic term would imply an assertion of his right to the whole?

Suppose, for instance, a king of France in some edict relative to the royal residence were to recite that he and the kings his predecessors had an undoubted right to the *Palais* in the city of Paris, could this be fairly construed into a confiscation of all the palaces of the nobility and clergy in the city?—or would it not be restricted by the rules of law as well as common sense, to that species of property which really belonged to the king?—and as the distinction must have been known to the framer of this edict, had he designed to have changed the law, or even to have declared, that every species of this kind of property belonged to him, he would have found some term to have expressed the idea, and would not have left any cavil to his subjects on the occasion; but that he did not intend it, is apparent not only from what I have said, but from the recital that in consequence of this right of property, he and his predecessors had ordered researches to be made, as to the isles and increments formed *therein* (the rivers), that is by *attérissement* in the bed, not by *alluvion* on the bank;—but it may be asked, why employ the word *accroissement* when he had already used the word *attérissement*, if they are synonymous?—but they are not. There are *accroissements* which are neither *attérissements* nor alluvions,—and it is to this species that the ordinance refers, as we learn from the most respectable authority.—" Il y a donc (says

" Ferriere, p. 52.) de la différence entre l'alluvion et *l'accroisse-*
" *ment* fait par la violence des eaux."—" Par notre droit Fran-
" çais, quand ces accroissements qui se sont faits tout-à-coup
" sont considérables, on prétend qu'ils doivent appartenir au
" roi, comme une espèce d'épave; ce qui paraît conforme aux
" ordonnances royaux, par lesquelles les isles et attérissements
" qui se forment dans les grands fleuves, appartiennent au roi."—
" " There is then a difference between an alluvion and an ac-
" croissement made by the violence of the waters."—" By our
" French law, when these accroissements which have been made
" suddenly are considerable, it is pretended that they ought to
" belong to the king as a kind of waif; which *appears to be con-*
" *formable to the royal ordinances* by which isles and attérisse-
" ments which are formed in navigable rivers belong to the
" king."

Thus every word in the preamble is satisfied without construing the edict so as to make a change in the laws of the kingdom, and an inroad upon private rights. Let us see whether the enacting part of the edict goes further.

For these reasons (says the sovereign), we *enact*—what?—That all alluvions shall hereafter belong to the crown?—that the occupants shall immediately abandon them?—No; but simply, that all the holders, proprietors or possessors of isles, islots, accumulations, increments, *alluvions*, rights of fishery, &c. on navigable rivers, shall be maintained in their possession, on paying one year's revenue, if they have a title prior to the year 1566, or two years' revenue, if they have no title or possession prior to that period.

The same observation may be made as to the body of the edict, which was used with respect to the preamble. There are alluvions to which the king had a right, and there are others to which he had none. Of the first kind were those which were formed upon his property; of the latter those which were annexed to that of his subjects.—The islands in navigable rivers were his; islands more frequently are enlarged by alluvion than lands on the bank, because the current always forms an eddy at the lower end of an island. This alluvion belonged to the king, because it was annexed to, formed a part of his property. When, therefore, he was confirming the title to the possessor of the island, he did it but by halves, if he did not give

him the alluvion also, and he accordingly does give it. Here we have the true reason why this word is used in the enacting clause,* but omitted in the preamble. He could not in the preamble, declare that he had a right to all alluvions on navigable rivers, because it would not have been consistent with truth;—but he used it in the enacting clause, because it was necessary to assure property of that description to which he had a right, upon the very principles for which I contend, viz.—That alluvions belong to those upon whose lands they are formed.—It is then only by a very forced construction of this edict, that we can with Mr. J. think it so decisive as to *put aside* all doubt, or that it can form even an argument in his favour.

If, however, it should be conceded that the king intended to rob his subjects of property they before had, and to vest it in the crown, it would be a void act; for though the sovereigns of France had much greater and higher prerogatives than those in other more favoured countries,—yet the people did not hold their property solely at the will of the monarch; there were fundamental laws to protect it, which their kings swore to observe;

* In my Examination, p. 10, I say on this subject,

"Because the word alluvion is introduced in the list of property that is confirmed to the proprietors, I do not perceive that he arrogates to himself a right to the alluvions which shall be formed upon the land thus bounded on the river; and I can account for the word being introduced into this part of the edict, by supposing that it was the intent of the king to confirm to possessors of islands, not only the original soil of those islands, but also the increase which they had gained or might thereafter gain by alluvion. This is a very natural construction, not only from the omission of the word in the declaratory part of the edict, but because islands are more frequently increased by alluvions than the banks of the rivers themselves; and thus the words of the edict may be satisfied without making it at war with the fundamental laws of the kingdom." This reasoning Mr. J. either does *not deign* to notice, or *could not* answer, for it is passed over in silence. Having, when I wrote, no authority for my explanation, I should not have had the vanity to attribute his silence to the force of the argument while I thought it only mine; but I have since discovered, that it is supported by such high authority, that I am relieved from the mortification of supposing the argument was not answered, because it was beneath my opponent's notice.

The parliament of Bordeaux, in a remonstrance to which I shall hereafter refer, speaking of this edict, says: "If the edicts of 1693 and 1710, to islands and islots have added the words *alluvions* and *attérissements*, we must understand by this, the alluvions and attérissements formed upon the islands and islots which belong to the public property, *when they are in the channel of the river.*"

—there were privileges and franchises which they were bound to respect. Every province had its code, which was secured by the several treaties which annexed them to the crown. For instance, by the treaty of the 12th of June 1451, by which Guienne was annexed to the crown, Charles the VIIth, stipulated as follows:—" Et fera le roi à l'entrée de la dite ville de " Bordeaux, au jour dessus dit, s'il y est présent, ou mon dit " seigneur le comte de Dunois, pour lui, si le roi n'y peut être, " le serment sur le livre et sur la croix, ainsi qu'il est accou- " tumé, de tenir et maintenir les habitans d'icelle ville et du " pays, et chacun d'eux présents et absents qui demeureront ou " demeurer viendront en son obéissance, en leurs franchises, " privilèges, libertés, statuts, loix, coutumes, establissements, " styles, observations et usances du pays de Bordeaux en Bor- " delois, de Bazas en Bazadois, et d'Agen en Agenois."

" And the king on his entry into the said town of Bordeaux, " if he be personally present, or the said lord the count de " Dunois, on his behalf, if the king cannot be there, shall swear " on the book and the cross, in the usual manner, to keep and " maintain the inhabitants of the said city and country, and each " of them present and absent who shall reside or come to reside " under his allegiance, in their franchises, privileges, liberties, " statutes, laws, customs, establishments, forms of proceeding, " observances and usages, of the country of Bordeaux, in the " Bordelais, &c."

Indeed it is difficult to imagine any country of which the fundamental laws would permit the sovereign to take away private property without the pretext of necessity, or the allegation of crime.—In the most despotic countries of which we read, though life be not secured from the bow-string, nor property from arbitrary confiscation, yet neither the one nor the other is taken, except on the allegation either true or false of some crime;—and I doubt whether even in Turkey, the sovereign would venture to declare any species of private property, generally vested in the crown;—certain it is, that he could not do so consistently with the fundamental laws of the empire,—for even there, there are such laws, though they may be frequently violated with impunity.

It will hardly be contended, that the edicts of the kings of France had more binding effect than the rescripts of the Roman

emperors;—yet we find there are bounds set to the authority of the latter in matters of private right. "Cod. 1. 19. 7. Rescripta "contra jus elicita ab omnibus judicibus refutari præcipimus."— "We command all our judges to disregard every rescript pro- "cured against law."—"Ib. tit. 22. l. 6. Omnis cujuscumque "majoris vel minoris administrationis universæ nostræ reipub- "licæ monemus, ut nullum rescriptum, nullam *pragmaticam* "*sanctionem*, nullam *sacram adnotationem** quæ generali juri "vel utilitati publicæ adversa esse videatur, in disceptationem, "cujuslibet litigii patiantur proferri, sed generales sacras con- "stitutiones modis omnibus non dubitent observandas."—

"We admonish all the judges both of the inferior and superior jurisdictions of our republic, that they suffer no rescript, no pragmatic sanction, no sacred adnotation to be used as authority in any suit which are contrary to general law or the public utility."

But the right of alluvion depends not on municipal, but on natural law. Quod per alluvionem agro nostro flumen adjicit, *jure gentium*† nobis adquiritur. D. 41. 1. 7, s. 1. Every provision therefore destructive of private property held by virtue of this general law, seems to have been considered as void even under the imperial despotism of Rome; and if this edict really declares what Mr. Jefferson says it does, the utter disregard in which I shall shew it has been held in France, would be a strong argument that the same notions as to the power of the crown prevailed there.

This edict, then, neither purports to change the law, nor if it did would it operate that effect. But after reading it what shall we say to the assertion p. 29. "By this edict, he, (Louis XIV.) declares the law of France "*incontestably* to be that *alluvions belong to the king in all navigable rivers*." The words I have

* *Pragmatica Sanctio* was the decision of the prince by the advice of his council, and *sacra adnotatio*, was the Emperor's answer given in a *short note* at the foot or in the margin of a petition or libel.

† The words *jus gentium*, *jus naturæ*, *naturalis ratio*, are indifferently used in the Roman Jurisprudence to express the same idea.

Ait imperator *jus gentium* esse quod *naturalis ratio* inter omnes homines constituit.

"Quam ob causam et ipsam, quoque *jus naturæ* passim appellatur et æquum, et bonum, et naturalis æquitas, et natura." Vinnius, Com. on the Inst. Lib. 1. Tit. 2.

written in Italics are marked by Mr. Jefferson with inverted commas, as a quotation from the edict itself. But the edict contains no such sentence, and its different parts have been laid under contribution for words to form it. The words *incontestably belong* are taken from the preamble where they are used in reference to attérissements and islands;—the word *alluvion* is taken from the enacting clause, where, as we have seen, it was introduced in order to give what the king had a right to give;—and thus by transposing those disconnected words, bringing them together, and coupling them with each other, the legislator is made to declare what he did not declare and to assert what he had no right to assert. It is painful to be on the watch for these misrepresentations—it is irksome to detect them;—but what must we think of the cause that forces a man of high character to have recourse to them?

Thus we have examined the whole evidence of the law of France which the president of the United States had at the time he acted, or has been able to procure since. It consists as we have seen of five partial quotations from writers, of whom certainly *four* and probably all speak a different language when fully examined: and of one edict which I think has been proved not to contain the provisions attributed to it, and which could not, and most certainly has not produced any practical change in the tenure of this species of property; for to his authorities and his edict Mr. Jefferson has not and could not add a single decision conformably to his ideas of the law. Of two things then, one: either this act does not purport to declare or change the law in the manner he contends, or if it does, the act has been deemed void; for cases are not wanting under it. The object of this edict, though it neither was meant to claim, nor does claim alluvions, was yet clearly unjust and oppressive, since it forced those who for one hundred and twenty-three years had possessed the ferries, mills, attérissements, islands, &c., on navigable rivers under regular grants, to pay a year's revenue; and those who had later grants, the income of two years.—It was made at a time when the finances of the kingdom were in the most frightful disorder. The revocation of the Edict of Nantz had destroyed the manufactures, the English and Dutch had annihilated the commerce of France, and long wars had exhausted her resources. About this time the royal plate was sent to the mint,

offices and titles of nobility were sold, the coin was debased, every contrivance, just or unjust, was resorted to, for replenishing the empty coffers of the state; and it is not wonderful that among them we should find this attack on the occupants of islands and other royal rights on rivers; and if Mr. Jefferson's *generic term* "increment" had been designedly introduced with a view to claiming alluvial property also, it is astonishing that no cotemporaneous case should be mentioned in which that construction was put upon it. The successors of Louis the XIV., however, were not less extravagant and of course not less needy than himself. The ambiguity of this expression struck some of them as a proper engine of rapacity, and attempts were made to rob the riparious proprietors in different parts of the kingdom, of this lawful accession to their lands, but always with the same ill success; in every instance, and I shall enumerate many, the fiscal harpies were discomfited. The edict was declared not to extend to the case of alluvions, and the question was finally settled in France, by the decision of the famous case of Bordeaux.

Before I take my leave of this edict, it is very important to remark that unless it expressly *changes* the law of the kingdom, it cannot operate on this question; because Mr. J. (p. 25 *in notes*) acknowledges that Louisiana was governed by the custom of Paris, of which the *Roman law* formed a part; he acknowledges (p. 26) that the Roman law gives alluvions to the riparious proprietors, but says that this was controlled by the *ordinances*. If then the ordinances do not expressly change the Roman law in this particular, its disposition as far as respects Louisiana must prevail.

That the reader may have ample materials for drawing a fair conclusion from the arguments on this head, I shall proceed to state a succession of authorities and decisions, drawn from the French jurisprudence, which I think from their weight, number, and uniformity, must convince all those who are open to conviction.

To begin with the authorities:—

Cujas* the Nestor of the French jurisprudence, expresses nimself thus: Alluvio—non est jus fisci aut principis ut ab eo

* Sometimes called *Cujacius*.

emi, vel dono peti possit quasi possessio vacans. *Cujas*, *Paratit. Cod.* L. 7. 41. *Vol.* 2. *p.* 259.

" Alluvion is not a fiscal right or the property of the prince, so that it may be bought or given as a vacant possession."

Id autem quod per alluvionem accrescit fundo nostro adeò nostrum fit, ut a fisco vindicari et vendi non possit, itaque ut non possit vendi a principe quasi possessio vacans et præterea id singulariter constituitur in leg. 3. h. t. ut nihil fisco inferatur pro incremento alluvionis. *Cujas*, *Com. in Cod. L.* 4, *tit.* 41.

" But that which is added to our land by alluvion becomes ours in such a manner that it cannot be claimed or sold by the treasury, nor can it be sold by the sovereign as a vacant possession; and it is specially provided by the third law of this Title, that nothing accrues to the treasury for the lands created by alluvion."

Boutheiller,* a counsellor (one of the judges) of the parliament, who wrote in the fourteenth century, proves that as early as his time, this doctrine was established.

" Si la rivière accroît par son cours d'eau, elle accroît aussi au roi; si elle s'appetisse, l'accroissement est pour le seigneur ou propriétaire par la terre de qui elle passe."

" If the river enlarges itself in its course, the encrease is for the king, if it grows narrower, the encrease belongs to the lord or proprietor, by whose lands it flows."

Bacquet, who was the king's advocate in the treasury, and who was obliged officially to support the pretensions of the crown, in his *Traité des Droits de Justice*, *Ch.* 30, *No.* 8, says: " Si l'attérissement fait par alluvion, n'est au dedans des fleuves publics et rivieres navigables, mais hors icelles, *si incrementum alluvione factum non fit in alveo fluminis sed extra alveum*, il appartiendra à celui à l'heritage duquel l'accroissement aura été fait, et le dit accroissement n' appartiendra pas au Roi ni au seigneur haut justicier, lesquels ne pourront prétendre que droit de justice ou de censive s'il leur appartenoit."

" If the *attérissement* made by alluvion is not within a public and navigable river, but without, *if the increase made by alluvion*

* For this and some of the following authorities, I am indebted to Messrs. De Liege, Mailhe and Berryer, counsellors of eminence at Paris, whose opinion is decisive, that the law of France as it stood at and before the period of the late revolution, was the same with the Roman law, on the subject of alluvions on the banks of rivers.

is not made in the channel of a river, but without the channel, it shall belong to him to whose freehold the increase shall have been attached, and the said augmentation shall not belong to the king nor to the lord high justiciary, who can only pretend to the droits of *justice & censive,** if those rights belong to them."

Ferriere, in his commentaries on the code, Lib. 7, Tit. 41, draws the same distinction between *attérissements* formed in the middle of a river, which he says belong to the king, and *attérissements* made by alluvion out of the river's bed, which belong to adjacent proprietors.

Salvaing, first president of the chamber of accounts in Dauphiny, supports the same doctrine in his treatise *sur l'usage des fiefs*, Ch. 60, Vol. II. p. 67.

Berthollet Dufferier, who wrote a treatise on the *droits* and *domaines* of the king, acknowledges the same position to be the law of France. Ch. 31.

" Mais les accroissements faits hors les rivières, appartiennent aux propriétaires des héritages les plus proches et non au roi, &c.

Le Fevre de la Planche, advocate of the king in the chamber of the domaine, and who composed a treatise on the rights of the domaine printed in 1764, after having declared with other writers above cited, that the attérissements formed within the channel of a river belong to the king, adds: " Qu'il n'est pas de même d'un amas insensible que la rivière entraine peu à peu, qui accroit à l'heritage contigu par forme d'alluvion *suivant le droit Romain auquel le nôtre est conforme.*

Larvé, advocate in the parliament of Paris, in a work intitled " *Théorie des Matières Féodales*" adds his authority to the same position; his publication appeared in 1785.

To these authorities add those of *Denisart*, *Guyot* the younger, *Ferriere*, the *Encyclopedia*, from all of whom I have given extracts above, and we shall have a body of authority not surely to be shaken by the unsupported opinion of *Pothier*, who on this subject, contrary to his usual practice, cites neither authority nor decision.

I will refer the reader however to *Renusson*, Traité des Propres, p. 39.

" It often happens that an inheritance which is bounded by a stream or navigable river, is augmented or diminished by the

* Baronial Courts and quit-rents.

stream, which forsakes its ancient bed and makes for itself another; this augmentation or diminution is a profit or loss to him who has the adjoining inheritance; the increase is an accessory which belongs of common right to the proprietors of the soil which is contiguous to it."

Dumoulin, on the ancient custom of Paris says: "The increase of alluvion is acquired to us in the same right by which the original soil belonged to us, nor is this increase considered as a new field, but as a part of the first."

I shall close this long list of authorities with the respectable name of *Domat;*—he teaches us that "the proprietor of an estate acquires the possession of whatever may be added to it by nature, which augments the land and becomes as it were an accessory thereto; thus the insensible increase which may be gained by an estate joining to a river by the operation of the water, is an acquisition accruing to the proprietor of the estate." 1 Dom. 268.

In addition to this long series of well digested opinions coinciding with that which I support, I had in the first discussion of the subject, (Exa. p. 31 and 35) cited the preliminary discourse of Portalis to the title in the new code which sanctions the same provisions as part of the law of France. I quoted from this discourse the assertion that the provisions of the new code were conformable to the ancient law of the kingdom as SETTLED at a period prior to the revolution, and that the contradictory opinions grew out of the feudal system. This is answered (Jeff. 34) by saying: "And here Portalis' *rhetorical flourish* is cited with triumph, as declaring that this law terminates the great question of alluvion and decides it conformably to the Roman law; it is very true indeed, that it has terminated the question as to future cases, by changing the law &c., and had Louisiana been subject to France, the law would have been changed *thenceforward*, for Louisiana also." Whoever should read this passage without having seen those to which it purports to be a reply, must imagine that Mr. Duponceau and myself had advanced the absurd proposition that the question was to be decided by the provisions of the Napoleon code. There is not much ingenuity, and there is less candor in making weak arguments for your adversary and then shewing your own strength by refuting them. Need I repeat that the articles of the new

code and Portalis's exposition of them were cited, not to shew that the law of France was changed, but that the new provisions were conformable to the old law; not to take advantage of a change, but to shew that there had been none; and to prove, by the declaration of one of the first lawyers of modern France, that the law was *settled* prior to the revolution, by a *solemn decision** on the side of the question that I espouse.—This argument pressed hard on the late president, and he gets rid of it by calling a plain sober opinion a "*rhetorical flourish*," and by inventing for his adversaries a ridiculous argument which they never used.

In the discussion to which I have been obliged more than once to refer, (Ex. p. 31) I expressed myself as follows:

"A most persuasive, if not a conclusive argument, that the law of France is as I have stated, may be drawn from the following circumstances and opinions. When the first consul undertook the great task of giving a general system of jurisprudence to France, he caused his Digest or *Projet de Code*, to be prepared by the first lawyers in the country. This was printed, and a copy sent to every superior tribunal in the republic, for their consideration; and, after a proper period, it was returned with such remarks and amendments, as had occurred to the different judges, that the legislature might, prior to its final adoption, have the benefit of the best legal advice on its different provisions."

"The articles in this *Projet*, relating to the subject under discussion, are contained in the second section, second title of the second book, and are as follows:

"15. The collections of earth, (attérissements) and accessions which are annexed successively and imperceptibly to the land, bordering on a river or navigable stream, are called *alluvion*. Alluvion belongs to the riparious proprietors, when it takes place on a river, whether it be navigable or capable of carrying rafts or not; under the condition, in the first case, of leaving the path prescribed by the regulations."

* I shall presently state at full length, the whole of this celebrated case, from the original printed documents, a set of which is in my possession, and another in that of Mr. Duponceau. I was not able to procure these documents until a late period of this controversy; and therefore, in my former publications, I could only speak of this important decision in general terms, principally on the authority of M. Portalis. This has emboldened my adversaries to treat that high authority with neglect, and style it a *rhetorical flourish*. But now the facts shall speak for themselves.

"16. The rule is the same with respect to the running water, which retires insensibly from one of its banks, and encroaches on the other; the proprietor of the shore which is left dry, shall benefit by the alluvion, and the proprietor of the opposite shore, shall not be permitted to reclaim the land which he has lost."

"If," I continued, "this part of the projet had made any change in the ancient laws of the country, some of the learned men to whom it was submitted, would have taken notice of the novelty, with marks either of censure or approbation; but we find them all either passing over the articles as declaratory of the old law, or else expressly acknowledging them as such, and stigmatizing the doctrine now contended for by Mr. Derbigny, as an oppressive, and ineffectual attempt to pervert the laws of the kingdom."

"To begin with the tribunal of Paris: they set out with this general observation on the part of the code containing the provisions. "The rules proposed," (they say) "on the subject, are in general conformable to what has ALWAYS BEEN PRACTISED, and gives occasion to but very few observations," and among those few are none on the subject of alluvion."

"The tribunals of Nancy, Nimes, Orleans, Riom, Liege, Metz, Montpellier, Agen, Aix, Grenoble, Poitiers, Rennes and others, pass over these provisions as matters of course, or recommend a slight alteration, to prevent disputes between the proprietors of lakes and the adjoining land."

"The tribunal of Rouen has these strong expressions, speaking of the nineteenth article of the *Projet de Code*, which declares islands in the middle of navigable rivers to belong to the nation; they say:

"The Roman law gave to the adjoining proprietors the islands which were formed in navigable rivers; a disposition which appears more equitable than this article of the Code, and MORE WORTHY OF A GREAT NATION, whose true interest is not to acquire property to the injury of individuals."

"The edicts and declarations of the former kings, which claimed for the domain the ISLANDS of navigable rivers and *fleuves*, (primary rivers) were mere FISCAL LAWS; these laws were founded on the FALSE PRETEXT that the islands were an appendage of the river, which they considered as belonging to the king. But,

"1. The river itself is not a national domain, but a thing of which the public have the use; it belongs to the nation not in full property, but as an appendage of its sovereignty."

"2. The islands are not appendages to the waters of the river, but to the bed of the river; the right of individuals to which is acknowledged when the river abandons."

"3. An island cannot be formed without increasing the width of the river at the expense of the adjoining land; and the damages to which the proprietors of these lands are exposed, should entitle them to the islands, as an indemnity for the risks and losses they incur."

"The principle which we propose, would not at all invade the public right to the islands which the nation possesses, or for which they have positive titles; but it would tranquillize those individuals, who, FOR AGES, have possessed islands in the rivers as the true owners, and whom the agents of the domain HAVE always vexed without having EVER SUCCEEDED IN DESPOILING THEM OF THEIR ESTATES."

Thus, in the publication above referred to, I stated the opinions of the different tribunals of France, when consulted on the very question before us, and the correctness of my statement is not denied. And yet, (who would believe it?) Mr. Jefferson is pleased to dismiss this powerful mass of authorities, with the unfounded assertion, that they are silent on the subject of alluvions. (See Jeff. p. 35.) "The tribunal of Paris," says he, "is quoted *with an acknowledgment that they do not make a single observation on the subject.*" A more extraordinary attempt to mislead, I have seldom witnessed. I am made to acknowledge, that the tribunal of Paris does not make a single observation on the subject, when the quotation I give from their opinion declares, "that the rules proposed on the subject," (what rules? why those in the *Projet de Code*, among others, giving alluvions to the adjacent proprietor) "are in general conformable to what has ALWAYS BEEN PRACTISED, and give occasion to but very few observations." Here then, I think, is not only an observation, but a strong expression of opinion that the new law was conformable to the old, or, at least, to what had always been practised under it; and to shew that they did not consider the proposed rules, on the subject of alluvion, as an innovation on what *had before always been practised.* I admit that in the few *other* observations they make, there are none on the sub-

ject of alluvion; yet from the very ingenious mode in which the assertion of my wily adversary is made, every one who reads his reply will imagine, that I had fully acknowledged, that the tribunal of Paris had made *no observation whatever* on the subject in question, although I quote an expression of their opinion in the strongest terms. On the same passage he asserts, and afterwards repeats, "that neither the word *alluvion* nor the *idea* is to be found in *any of the quotations.*" How can this repeated, this solemn assertion be reconciled with the quotation from the tribunal of Paris, when speaking of the rules proposed on the subject of ALLUVION they say, that they *are conformable to what has always been practised?* How can any man assert that the *idea* of alluvion is not to be found in any of the quotations? How can he assert it, in the face of the second reason, given by the tribunal of Rouen, that "islands are not appendages to the waters of the river, but to the *bed; the right of individuals* to which, is acknowledged when the *river abandons it.*" Now if the title of the adjoining proprietor to the whole bed of the river is acknowledged, when it is abandoned by the water, does it not follow *a fortiori*, when a portion of it is abandoned in the case of alluvion, that the title is equally incontestable: The idea then of private right to alluvion, is presented in the whole of this quotation, and expressed in the most pointed manner, since the public right in the stronger case even of islands and accretions in the bed of the river is denied.

My reasoning, it is said, cannot be characterized respectfully. It may probably be weak and inconclusive; but I trust it does not deserve those epithets which can alone designate the attempts made to misrepresent it.

Having thus given the opinions of the most celebrated French jurists, both ancient and modern, and added to them the sentiments of those legislators, who, in making new laws, declare what the old were, I proceed to fulfil the residue of my promise, by shewing a series of decisions on this head, all of them in direct contravention of those principles, which it is pretended were established by the edict of 1693; all of them denying the royal right to alluvions, and enforcing that of the adjacent proprietor.

The first is the case mentioned by Denisart, and reported by Guyot, adjudged on the 15th of April 1774, between the marquis de Bouzols and M. de Chamflour, in one of the

sections or chambers of the parliament of Paris, denominated the fourth chamber of Inquests, (*des Enquêtes.*)

The second case is also mentioned by Denisart, as having been determined on the 22d of February, 1769, between the chapter of Luçon and M. Champagné.

These two cases turn chiefly on the distinctions between augmentations made slowly by alluvion, and those which are created on a sudden, and decide *that the first belong to the adjacent proprietor.**

The third was decided in the parliament of Paris, the 18th of March, 1765. The marquis of Langeron owned a fief, to which was attached the right of *haute justice*, upon the Loire, by virtue of which he claimed all the alluvions on that river, as being attached to his domaine; *and he cited as a decisive authority the edict of* 1693. His pretensions however were disallowed, and the land, formed by the alluvion of the river, was adjudged to the nuns of Marcigny, who claimed it as the riparious proprietors. This case is reported by Larvé, in his Théorie des Matières Féodales, which I have already cited.

Here, then, is one decision, of the highest judicial authority in the kingdom, rendered more than seventy years after the edict of Louis XIV had, as is asserted, put aside all doubts as to the general law of France; rendered on a full consideration of that edict, and directly contrary to that doctrine, which, it is pretended, was thereby established. What answer can be given to the irresistible argument drawn from this decision? Perhaps the same given to the decision in the case of the parliament of Bordeaux, (p. 34) "that it proves only that the Roman law of alluvion, was the law of the generality of Bordeaux, not that it was the law of *all France.*" If so, let me respectfully ask the learned author to turn to the 24th page of his valuable work, and tell the world how he can reconcile the existence of the Roman law of alluvion at *Bordeaux*, with his assertion of the paramount authority of the edicts, if those edicts did, as he says, *put aside* all further question as to the law of *France* on the same subject.

See to what a dilemma he has reduced himself in the pertinacious defence of a bad cause? He acknowledges (p. 25) that the Roman law formed part of the custom of Paris, and was

* See Denisart's statement of these two cases, above, p. 37.

transferred with it to Louisiana. He acknowledges (p. 26) that by the Roman law, alluvion belongs to the adjacent proprietor; but he says (p. 28 and 30) that the edict of Louis XIV being paramount, and prior to the charter of Louisiana, changed the law. Now if this edict changed the *custom of Paris*, why did it not change the *custom of Bordeaux?* Either therefore the answer to the Bordeaux decision is a bad one, or the argument from the paramount effect of the edicts is good for nothing.

To that Bordeaux case I now return, and shall shew that the terms of its decision, preclude even the wretched, inconsistent answer that has been given to it. It has finally settled all question on the subject, and is the last I shall cite. These were its circumstances:

On the 5th of July, 1781, an *arrêt* or order of the king in council was passed, of which the preamble declared, " that all or the greater part of the isles, (*islots*) accumulations, (*attérissements*) alluvions and deposits (*relais*) in the rivers Gironde and Dordogne, and on the coast of Medoc, from the point of Lagrange to Soulac, which forms an immense extent of ground in the space of twenty-two leagues, appearing to be usurped, there was an absolute necessity, for the interest of his majesty, to know the extent &c." Therefore the arrêt directed the grand master of the waters and forests of Guienne, " to proceed to the verification and search of those isles, alluvions and deposits, formed in the rivers Gironde and Dordogne, and on the coast of Medoc, from the point of Lagrange to Soulac;" and it directed surveys and plans to be made of those lands.

As soon as this arrêt was made known, and attempted to be executed at Bordeaux, the king's attorney general, whose duty it would have been to enforce the execution of the edict, had it been legal, came into the court of parliament, and communicated its contents; accompanying it with a motion, (*requisitoire*) of which the following is an extract: " The lands of *Medoc*, which the arrêt calls usurpations on the domaine of the king, are the shores (*les bords ou le rivage*) of the Gironde. They are morasses, of which the waters run into the river, or which are covered by those of the river in high tides; the first have been *enlarged* or *extended* by the *sand, which the flood has carried in*, by detaching it from other places on the same side of Medoc, so that what some have lost, others have gained; this sand is consoli-

dated, and *the industry of the inhabitants* has opposed *dykes* to the *efforts of this great river.* The second have been drained more than a hundred and fifty years, and this draining was made by virtue of *arrêts* of the council, who were impressed with the necessity of preserving this valuable property to the inhabitants."

"The Roman law and the *ordinances* of the kingdom, unite (pursues the KING'S ATTORNEY GENERAL) to secure to individuals the property of the *shores;* (rivages) *proprietas riparum illorum est quorum prædiis hærent; quâ de causâ, arbores quoque in eisdem natæ, eorumdem sunt.* 4 Ins. de Rer. Divis. §. Riparum 4. The seventh article of the twenty-eighth Title of the Ordinance of August 1669, on the subject of waters and forests, enacts, "*That the proprietors of estates bounded by navigable rivers, shall leave along the shore* (bord) *twenty-four feet at least in width, for a royal road and tow-path for horses, &c.* This article is only a repetition of the third article of the ordinance of Francis I. of May, 1520; the consequence is easily drawn. The shores of rivers may then be the property of individuals, charged with the servitude which is imposed for the public service. In a word, the property of the shores is vested in those who are proprietors of the adjacent lands; because, as Vinnius says, on the section *Riparum*, that which is not occupied by the river, is supposed to make a part of the neighbouring land. "The imperceptible increase," says *Ferriere*, on the § *Præterea*, 10 *Inst. de Rer Divis.* which the law calls *incrementum latens*, and which the river detaches, little by little, from one estate, and adds to another, "belongs, by accession, to the proprietor of the estate to which it is joined; because, *fundus fundo accrescit, sicut portio portioni.*" The attorney general then proceeds to cite *Demoulin* and *Lefevre de la Planche*, whom I have quoted above, with the observation, "that the same maxims are found in authors the most favourable to the *rights of the domaine.*"

"After considering principles so certain as these," (he adds) "it is difficult to imagine how the administrators of the domaine, could have imposed on the good faith of the council, so as to procure the arrêt," &c. and after a variety of observations in the same style, he concludes by proposing an humble remonstrance to the king; and in the mean time a stay of the execution of the

arrêt, until the pleasure of the king should be more clearly expressed. This measure was adopted by the parliament, "*for the reasons*" (*as they say*) "*set forth in the motion*" (requisitoire) "*of the attorney general.*" They order a *remonstrance* to the king, and an *injunction* against the execution of his arrêt.

On the 31st of October, 1783, the king in council, not satisfied with the conduct of the parliament of Bordeaux, in opposing the execution of the arrêt of 1781, by a new arrêt orders the execution of the first, and revokes the sentence of the parliament. On the service of this new order, the same attorney general presents a new *requisitoire* to that high court, containing very strong and spirited remarks on the conduct of the king's council. After describing, in lively colours, the dismay of the alluvial proprietors, at the illegal operation of the king's arrêt, he says: "they have still hopes;—they know that they shall find in the parliament generous defenders, who will never cease to assert in their favor the rights which secure their property; they know, and it re-animates them, that the magistrates will employ the authority which is entrusted to them, to arrest the violence of the instruments of the fisc, and oppose their usurpations."

I must interrupt my extract; it affords too painful a contrast between the minister of an absolute monarch, and the representatives, the magistrates of a free people. In France, the victim of oppression found a defender in the creature of the monarch who wronged him; he was reminded that a *French parliament* would never cease to defend his rights, and that the *authority* of the magistrate would shield him from violence. He was told this, and it was not a vain boast. Royalty itself respected his possessions; it bowed to the majesty of the law; and after an ineffectual struggle, gave up the contest. While here the free citizen, of a free and enlightened republic, is despoiled of the *same species of property*, claimed under colour of the *same laws*, by military violence; and he finds no parliament to remonstrate, no magistrate to defend him;—he is denied even a hearing; and the first officer of a republic succeeding to the claims of a *French monarch*, is permitted to enforce them in a manner, and to an extent, which the king could never dare, in the plenitude of his power, to do.

The attorney general proceeds in the same eloquent and manly style, to discuss the rights of the crown, to assert those of the

judiciary; and declares that, "although deeply impressed with respect for the laws which guard the national domaine, and with a sense of his duty to enforce them, he yet feels that there is another duty attached to his office; a duty of a superior kind: that of taking care that the name of the sovereign should not be used to oppress the subject, or deprive him of his inheritance." He closes by proposing another *remonstrance*, and a second *injunction* to the grand master of the waters and forests, *not to execute the royal decree*, "until the king should explain himself, in a legal manner, with respect to the rights claimed by the administrators of the domaine to the shores of navigable rivers, and the accretions, alluvions and *attérissements* which may be formed there." This is accordingly decreed by the court; the *injunction* issues, and it is *obeyed*. No officer of the crown, in an absolute monarchy, is found hardy enough to disregard the judgment of a competent court; no regiments of militia are ordered out to enforce the mandate of the sovereign, in opposition to it. The regular troops at Bordeaux, are not ordered to be in readiness to massacre those who might be inclined to support the dignity of the laws. The remonstrance is presented to the sovereign, and in the mean time, his reiterated mandate remains unexecuted.

The king and council however still persevere, and on the 16th of October 1785, revoke the last arrêt of the parliament, and direct a special agent to go to Bordeaux, and see the registering and publication of the king's order executed in his presence.—The parliament, however, does not abandon the cause, or forget the dignity of their functions; they protest against every thing done in consequence of the arbitrary order of the crown, and issue another arrêt declaring the transcription of the king's mandate, "*null, illegal, and incapable of producing any effect*," ordering another *injunction* against its execution, directing an appeal to the nation by a publication of all the proceedings, and finally another remonstrance to the crown. This last paper is dated 30th June, 1786; it is a learned and eloquent assertion of the rights of riparious proprietors in opposition to the sovereign's claim of alluvions on the navigable rivers of France.

Finding that the parliament of Bordeaux was not either to be deterred from the performance of its duty by the fear of royal displeasure, or dragooned into submission, and that they them-

selves were engaged in an illegal and unpopular claim, the counsellors of the crown were now only solicitous to obtain an honourable retreat. The public discussion of the subject had shewn so conclusively that neither the edicts nor the general law of France, gave this species of property to the king, that their only resource was to declare *that he had never claimed it.*—Accordingly, by letters patent, dated the 28th July 1786, reciting all the proceedings which I have detailed, the king declares that his *arrêts have been misunderstood*, that they were intended only to have the property *surveyed*, but not to take it; he directs, indeed by way of salvo for his dignity, that all the arrêts of the parliament shall be annulled, and that the surveys ordered by him, shall be made; but concludes with these words, which I should imagine would dissipate all doubts relative to these royal rights.—"We order therefore the grand master of the waters and forests of Guienne, to proceed with the *procès verbal* and surveys directed by our said letters patent: PROVIDED ALWAYS THAT IT SHALL NOT BE INFERRED FROM THENCE, THAT THE ALLUVIONS, ACCRETIONS AND DEPOSITS FORMED ON THE BANKS OF THE SAID RIVERS OR OF ANY NAVIGABLE RIVER, CAN BELONG TO ANY BUT THE PROPRIETORS OF THE SOIL ADJACENT TO THE SHORES OF SAID RIVERS; AND TO US, WHEN THE SHORES OF THE SAID RIVERS ARE ADJACENT TO THE SOIL OF LANDS BELONGING TO OUR DOMAINE.* Nor do we intend, under pretext of searching for and ascertaining what lands belong to the domaine, to disturb the proprietors in the possession and enjoyment of the fiefs, lands, lordships, and other property which has been anciently held by them or those under whom they claim, and which does not appear to be part of our domaine; and we order moreover,

* "*Sans néanmoins que l'on en puisse induire que les* ALLUVIONS, *attérissements et relais formés sur les bords* des dites rivières, NI D'AUCUNE RIVIERE NAVIGABLE, *puissent appartenir à d'autres qu'aux propriétaires des fonds adjacens à la rive desdites vivières, et à nous lorsque la rive desdites rivières sera adjacente à des fonds de terre faisant partie de notre domaine.*" It is to be here particularly observed, that the king does not speak merely of the alluvions of the Gironde and Dordogne, which were the particular subject in controversy, nor of those rivers only which flow through the district of Bordeaux, but he expressly says, that he does not claim the alluvions *formed on the banks of the* SAID RIVERS, *nor those of* ANY OTHER NAVIGABLE RIVER. What becomes, now, of Mr. Jefferson's learned distinction between the custom of Bordeaux and that of Paris?

that these letters patent which we have ordered to be transcribed in our presence on your minutes, shall be read, published and affixed, wherever it shall be needful."

After this formal recognition of the principles I contend for, by the highest judicial and legislative authority in the kingdom; after this solemn disavowal of the regal rights set up by my adversary;—after the publicity given to the decision, at a time when, if I mistake not, Mr. Jefferson filled a high station in the capital of France, it is a little extraordinary to hear him assert so positively that since the edict of 1693, no doubt could exist as to the laws of France on the subject of alluvion, and that those laws vested them in the king. The pertinacity with which this opinion is adhered to, is the more extraordinary as the position was abandoned by two of his fellow labourers, out of three in the same cause, and by the two who being educated in France, were, without any disparagement to the acknowledged merit and talents of the third, better qualified to determine a question of French law, than any gentleman whose professional education was entirely American. The solicitude of our author to obtain the support of his two colleagues on this important point is truly ridiculous.—In a laboured note (p. 37) he tries to coax Mr. Moreau out of his opinion, or to persuade the world that "*he is not decided*" in pronouncing it, and his extracts now shew me, why this *memoire* of Mr. Moreau* was never suffered to meet my unhallowed eye. The secretary of state once (I believe inadvertently) mentioned its existence, but on my expressing a desire to see it, changed the conversation, and I found there were reasons why it was deemed improper to communicate its contents.

The decided manner in which his other advocate, Mr. Thierry, had opposed this favourite doctrine, gave Mr. J. no

* In this note the author states that the distinction made by Mr. Moreau between alluvions in the bed of the river and on its banks, "*is new in this cause, having never been claimed by the plaintiff or his counsel, or suggested by any other who has treated the question.*" This is one of those gratuitous assertions with which the book abounds; in my first publication on the subject, (Ex. p. 18) the same argument will be found, and the same construction of the edict enlarged on, although I did not know at that time that it was the identical construction which had been adopted and relied on by the attorney general and parliament of Bordeaux, in the celebrated controversy above mentioned, and which was finally submitted to by the king of France and his council.

hope of soothing or converting him; and his argument on this point, most assuredly created no desire to enter the list with so formidable an adversary.

The president of the United States, therefore, skulks out of the ranks to carry on his irregular attacks, and then "*ejoins the standard*" of his leader (p. 38) with a compliment which he hopes will disarm his wrath and secure forgiveness for his desertion. The argument as to the feudal nature of the royal claim to alluvion becomes nugatory, after having shewn so conclusively that, whatever its origin, it does not exist in France; but that I may leave nothing unanswered, let us see how our author treats this subject.

I had stated that the lands in question were granted in *franc aleu* or *allodial* tenure, in which the feudal lord had none of those rights which attached to the other tenures in Europe, and that therefore even if the kings had the right to alluvions in France they had it not in Louisiana, where the tenure was different. I cited Portalis for the feudal origin of the royal claims, but did not enter into any discussion of the point, because I thought the general law of France to be (as I think it has been demonstrated) extremely explicit. To this it is replied that it is palpably erroneous to say that the feudal system was never introduced into Louisiana. But whether that position be erroneous or not, would seem to be of no consequence, since it is not the one now under discussion. The position is, that the lands in question were *allodial*, and that no feudal rights attached to that tenure. The mention however of feudal rights, fired a philosophic train of ideas too splendid not to be pursued. We are led, therefore, by this *ignis fatuus* through the morasses of ancient Germany, over the wilds of Tartary and the wizard heights of Wales, through Persia and China, over the Indus and the Niger, across the Alps and the Andes, into a discussion of the origin of property, and the first establishment of all governments from the St. Lawrence to the Ganges; and by the aid of our good friends the Edinburgh Reviewers, we find out that in Europe, Asia, Africa and America, including Wales and the Upper Creeks, all lands in every nation which do not belong to individuals, belong to the public.* All this may be very amusing, and is certainly

* Jeffers. p. 31.

very well calculated to shew that the author has studied the Edinburgh Review, but it as surely can throw no light on the present discussion.

It may, I think, reasonably be disputed that the sovereign possessed the land before it was parcelled out among the individuals of a nation, and the learned researches of the Reviewers certainly do not prove that he did. They prove only what I have stated, that whatever is not owned by individuals, is the property of the nation, and I think, were it necessary, strong reasons might be adduced to shew that a separate property in lands as well as moveables may be reasonably supposed to have existed before the establishment of any civil government, and that civil government was resorted to, to secure and to perpetuate those rights, but did not *create* them. I am accused in a very academical phrase, of *putting the cart before the horse*, and asserting *that the authority of the nation flows from the feudal system*, when I ought to say, it seems, *that the feudal system flows from the authority of the nation.* Now it unfortunately happens, that I have said neither the one thing nor the other. I simply observed on the authority of Portalis, that the royal claim to the beds of rivers was in France a part of the feudal system, and that my lands being held in *franc aleu*, were not governed by that system, leaving the question which way it flowed, whether from the system to the sovereign, or from the sovereign to the system, to be determined by those who have leisure to instruct us by their philosophic researches. All this however is idle discussion; the question is not whether vacant lands not granted by the nation to an individual remain in the sovereign, but whether *alluvions* belong to the proprietor of the land to which they accrue. Now this depends on the nature of the grant, says Mr. Jefferson. " Rome which was not feudal, and Spain and England which were, have granted them largely."—The whole of this is founded in error; the laws of Spain are *not feudal;* the whole body of the Roman law, including the law of alluvion, was transcribed and introduced into that kingdom by Alfonso the Learned in the 13th century, and many of the fundamental principles of the English law, are anterior to the introduction of feuds into that country. What credit we are to give to the assertion "*that France has not granted them at all*" we have just seen; but, however that may be, though par-

ticular governments may have derogated from the natural rights of individuals, the one in question depends not on "*the nature of the grant from the sovereign*," at least, not in the sense in which our author means it, which is, that whenever alluvions are not expressly granted, they are reserved, and are to be considered as vacant lands, which the sovereign may keep for himself, or grant to whom he pleases; for even admitting that the sovereign has the right to grant all vacant lands, yet this species of property, which is formed by gradual annexation to land before granted is never vacant, and of course cannot become the subject of the sovereign's right. This results from the nature of its creation;—it is *imperceptible;*—at what moment then can the sovereign right attach? It is incorporated with the private soil,—how then can it be separated? Its formation is carried on in secret, it is *latent*,—how then can it be discovered during the process? We find all these characteristics given in the definitions so frequently quoted.

Est enim alluvio incrementum *latens*. Per alluvionem autem id videtur adjici, quod ita *paulatim* adjicitur, ut *intelligi* non possit, *quantum* quoquo temporis *momento adjiciatur*.—"Alluvion is a latent increase. That appears to be added by alluvion which is added so gradually that we cannot know how great is the increase of each moment of time." II. Ins. Tit. 1. s. 20.

For these reasons we find the imperial law expressly referring the right not to any grant, but to the *law of nations;* which as we shall see is here used not in the modern sense of the code which binds nations in their intercourse with each other, but as synonimous to *natural right*. Præterea quod per alluvionem agro tuo flumen adjecit, *jure gentium* tibi adquiritur. "Moreover, whatever is added to thy field by alluvion, becomes thine by the law of nations." II. Ins. *ibid.*

Quod vero *naturalis ratio* inter omnes homines constituit id apud omnes gentes peræque custoditur: vocatur que *jus gentium* quase quo jure omnes gentes utantur. "What *natural reason* hath prescribed to all men, is observed among almost every people, and is called the *law of nations*, as being the law observed among them all." I. Inst. Tit. 2. s. 1.

And in the commentary of Vinnius on this text, the same idea is enforced. "Ait imperator *jus gentium* esse quod *naturalis ratio inter omnes homines constituit*—unde sequitur jus hoc

non ex legibus aut institutis populorum estimandum esse sed ex êo quod justum esse dictat ipsa ratio naturalis id est insita animis hominum notitia de honesto et turpi justo et injusto quam ob causam et ipsam quoque *jus naturæ passim appellatur* et æquum et bonum et naturalis æquitas et *natura.* "The emperor says, the law of nations is that which natural reason has prescribed to all men. Hence it follows that this law is not to be tested by the laws or institutes of particular nations, but by that which natural reason itself dictates, that is the notions of virtue and vice, of justice and injustice, which are innate in the mind of man. Wherefore it is called indifferently *the law of nature, what is just and right, natural equity and nature.*" Vinn. in Ins. p. 15.

Here we find the nature of that code defined, to which we are referred for the origin of this right, and from thence it may be inferred that even admitting the doubtful principle that all landed property was first vested in the nation, and by it parcelled out among individuals, yet all alluvions accruing to lands after they were granted, would not be the property of the sovereign, but of his grantee.—Mr. Jefferson himself acknowledges, page 42, that alluvion is an *accessory*, an *appendage*, an *appurtenance*, cites the maxim *that an accessory follows the nature of its principal*, and says that the equity of the right of alluvion was founded on the maxim "*qui sentit onus, sentire debet et commodum*," that as the owner was exposed to loss from the river, he ought to be indemnified by the increase of alluvion. Is it not extraordinary that with such materials in his hands he could not form the obvious conclusion, that after the grant was once made by the sovereign, the *accessory* which was subsequently attached to it belonged according to the principles of *natural right* to the grantee?—but, instead of this, he bewilders himself and his readers in a useless search into the origin of property lands; a research utterly nugatory, because whether the title came first from the sovereign or not, the moment the land on the bank became private property, the subsequent alluvion was an *accessory*, which he acknowledges must follow its principal, by the rules of natural equity—and therefore must also be vested in the proprietor of the land, not in the nation.

II. We next come to a position of which Mr. J. seems peculiarly enamoured, viz. "*That the right of alluvion accrues only to rural, not to urban possessions, and therefore that had the batture been an alluvion, and governed by the Roman instead of the French law, the conversion of the plantation of Gravier into a suburb made it public property.*" These words, I should suppose, mean, that although Gravier's plantation had been increased by alluvion to a very considerable extent, prior to his laying it out into a suburb, the very act of dividing it into lots, vested in the public all that part which had been created by alluvion; an assertion which he leaves unsupported by either argument or proof; and which modifies his position, in a manner that renders it entirely inapplicable to the present case. This position is, "that the Roman law gave alluvion only to the *rural* proprietor of the bank; *urban* possessions being considered as *prædia limitata.*" Now, admit this wild assertion to be true: does it follow that the alluvion created before the ground became a city belongs to the public? On the contrary, does not Mr. J. himself allow that it is an accessory, and that the accessory must follow the principal? If this be so, the question is at an end: because the ground on which my house stood, and from which I was driven, was formed long before the existence of the suburb.

But the position is not only inapplicable, but unfounded. Let us examine how it is supported. The Institute in defining this species of property, or rather this mode of acquiring it, says, "What the river has added *agro tuo*, by alluvion, is thine;" the Digest uses the same expression. Now *ager* in Latin and *agros* in Greek, mean a *field.* Land in the city is called *area*, a lot. Therefore you must shew, says the conclusive and most learned reasoner, that your alluvion accrued to a *field*, or you are not entitled to it: because there are no *fields* in a *city.* I must answer this argument, or it will be supposed that this very learned page has silenced me; and many an honest citizen who understands no Greek, but "*honors the sight*" as much as Boniface did "*the sound of it*," will suppose some unanswerable argument lies hid in the cramp characters that adorn it. Seriously, then, let me tell my very learned adversary, first, that *ager* in Latin means not only a *field*, but the generic term *land*, and that too, situate in a village, and to take away all cavil, in a *city.*

Formâ censuali cavetur ut AGRI sic in censum referantur: Nomen fundi cujusque, et in quâ *civitate* et quo *pago* sit. Dig. 50, tit. 15. lex 4. 1. "In the tax list let it be observed, that the *lands* (*agri*) be thus reported: the name of each estate, and in what *city* or in what *village* it is situate."

"Is vero qui *agrum* in aliâ *civitate* habet, in eâ *civitate* profiteri debet in quâ *ager* est." Dig. 50. 15. 4. 2. "But he who hath *lands* (*agrum*) in another *city*, should be credited in the *city* in which his land (*ager*) is situate."

Here we see that *ager* is used for landed estate, either in a *village* or a *city;* and that there may be no doubts raised as to the signification of the term *civitas*, let us see what is its definition.—"*Civitatis* appellatione non veniunt suburbia, sed id solum quod murorum ambitu terminatur."—Calvin's Lexicon, verbo *civitas*. "Suburbs are not comprehended in the term city, but that space only which is contained within the walls." Again, we find the term *ager* used in the same sense, in the 50th Dig. tit. 8. l. 9, § 2.—"Item rescripserunt *agros* reipublicæ retrahere curatorem *civitatis* debere," &c. Here the administrator of the *city*, is directed to reclaim the *lands* (*agros*) of the public; a duty that would have been devolved on the *præses provinciæ*, if the property had not been situate within the *city*.

Secondly, I may be permitted to remark that the Roman law, in speaking of alluvions, does not confine itself to those which are annexed to a field, (*ager*) but indifferently uses the term *fundus*. Take a few out of many examples: "Id alluvionis jure ei quæritur, cujus *fundo* accrescit." Cod. 7. 41—1. Sed et si post emptionem *fundo* aliquid per alluvionem accesserit, ad emptoris commodum pertinet. 3 Ins. tit. 24. § 3.

"Ergò si insula nata adcreverit *fundo* meo, et inferiorem partem *fundi* vendidero," &c .Dig. 41. tit. 1. l. 30.

"Altius *fundum* habebat secundum viam publicam," &c. &c.—Ib. l. 38. Here, and in numerous other instances, the expression is *fundus;* a term of the most general import, fully answering that of *land* in the English law, and expressly including *town-lots*, *town-houses*, and every other species of real property, either in town or country, as we find by the following:

"*Fundus* est omne quidquid solo tenetur—*ager* est si species fundi ad usum hominis comparatur."—Dig. lib. 50. 16. 115.

"*Fundus*, (*land*) is every thing which is fixed to the soil—it is *ager* if prepared for the use of man."

"*Fundus:* Id omne significat quidquid solo seu terrâ tenetur, seu ager, seu villa seu prædium seu ædificium, seu stabulum, seu AREA, seu insula sit."—*Calvini Lexicon Juridicum*, verbo *ager*. "*Fundus* signifies every thing that is fixed to the soil or the earth, whether it be a field, or a *country seat*, or a *tavern*, or any real *property*, (*prædium*) or a building, or a *town-lot*, (area) or a town-house, (*insula*)."

That *fundus* relates to *urban* as well as *rural* property, may be also shewn from the following passage:

"Quærebatur, si quis *à Sicilia* servos *Romam* mitteret *fundi instruendi causâ* utrum pro his hominibus portorium dare deberet, nec ne?"—Dig. 50. 16. 203. Here the general term *fundus*, is clearly used for an estate in a city; for the question supposes the slaves to be sent from Sicily to *Rome*, for the purpose of furnishing the *fundus* (the estate) there. Again: "*Fundi* appellatione *omne ædificium et omnis ager* continetur."—Dig. 50. 16. 211.

I might multiply these quotations to an extent that would be fatiguing to the reader; these, certainly, are sufficient to shew, that both *ager* and *fundus* are general expressions, which embrace every species of estate; but to make the law on this subject still more explicit, I may add that the Roman jurisprudence not only speaks of alluvions as being incident to the *ager* and the *fundus*, but the *prædium* also; thus using every expression to shew, that it was not confined to any one species of real property, to the exclusion of the others.

"Inter eos qui secundum unam ripam *prædia* habent, insula in flumine nata non pro indiviso communis fit, sed regionibus quoque divisis."—Dig. 41. 1. 29.

In the Institutes, lib. 2. tit. 1, § 22: "Insula in flumine nata, (quod frequenter accidit si quidem mediam partem fluminis tenet) communis est eorum, qui ab utrâque parte fluminis *prædia* possident, pro modo (scilicet) latitudinis cujusque *fundi*."

And in the Digest 41. 1. 7, we have an example of the three expressions, *ager*, *fundus* and *prædium*, indifferently used:

"§1. Præterea quod per alluvionem *agro* nostro flumen adjicit, jure gentium nobis adquiritur.—

§ 2. Quod si vis fluminis partem aliquam ex tuo *prædio* detraxerit et meo *prædio* attulerit, palam est tuam permanere. Planè si longiore tempore *fundo* meo hæserit, arboresque quas secum traxerit in meum *fundum* radices egerint, ex eo tempore videtur meo *fundo* adquisita esse."

The word *prædium* is still more generally used, in the most comprehensive sense, than either *ager* or *fundus*, and is derived, according to Varro, from *per hæredium*, or, as we should term it, an estate of inheritance. After the definitions of *ager* and *fundus*, the 115th law of the Dig. de *verb. signif.* gives us the signification of *prædium* as follows:

" *Prædium* utriusque suprascriptæ generale nomen est."

" *Prædium* is the general name for both the preceding terms."

But I think in the reasoning to which Mr. Jefferson refers me, and which he makes his own, it is said that there are *prædia urbana* and *prædia rustica*, city estates and country estates, and that I shew nothing, unless I shew that the right of alluvion accrues to the former by *name;* but surely when I shew that it accrues generally to *estates*, to *land*, to the *soil:* when I shew that every term used to express an interest in real estate, is employed on the occasion, I shew enough to throw the burthen of any exception upon my adversary. I might say to him: I have shewn that this right accrues to the *ager*, to the *fundus* and the *prædium;* and I have shewn, by the most approved definitions, that all these terms include lands in the city as well as the country. If the law however does not apply to city property, do you shew it. There is, sir, I know, the *prædium urbanum* and the *prædium rusticum;* but permit me, most learned civilian, to suggest to you, that there is also the *servus urbanus* and the *servus rusticus*, and that you might as well tell me, when I cited any one of the thousand laws on the subject of *town* generally, that it did not apply to the *town slave*, because he was not particularly named;—nay, you might make the same exception to the *country slave*, and thus shew, that what applied to all generally, could not affect any in particular. And, if it were not too presuming, I might add, you have made a slight mistake, in supposing that *prædia urbana* were always situate in a city; the name, sir, has misled you.* Before you write books

* Urbana prædia omnia ædificia accipimus, *non solum ea quæ sunt* in oppidis, sed, et si forte stabula sunt vel alia meritoria in villis et vicis vel si prætori

on the civil law; and above all, before you rely so much on your knowledge of it as to strip a citizen of his property, it would be well to study and digest its principles. Its maxims are,—"*in eo quod plus est semper inest et minus;*" "*In toto et pars continetur;*" "*semper specialia generalibus insunt.*"—Ponder on these, learned sir, and do not insist that a bequest of horses, generally, does not include those of the testator, because they happen to be white horses,* black horses, or even pied horses.

But if you will not be content, without a positive law, that the right of alluvion accrues to property in the *city* as well as the country, I believe, sir, I must gratify you. If it had not been, however, for the bad habit you have fallen into, of being learned at the expense of others, of repeating quotations without looking at the text, you would have saved me this trouble, and yourself the mortification of repeating a triumphant challenge to produce an authority which you would then have seen was under my hand.

You have repeated, after those who went before you, the quotation, "In agris limitatis jus alluvionis locum non habere constat;" had you read the rest of the same law, you would have found the very authority you challenge now to produce: "Et Trebatius ait, agrum qui hostibus devictis eâ conditione concessum sit ut in *civitatem veniret*, HABERE ALLUVIONEM;" "and Trebatius says, that land conquered from the enemy, and granted on condition that it shall be included in a city, is entitled to the right of alluvion."

I repeat that I need not have produced this authority, and that nothing but my desire to oblige you, sir, has induced me to submit it to your inspection; but after this I hope we shall not have a third repetition of the challenge.—Such might be my address to my erudite adversary, if I were not restrained by respect for the *conviction* he expresses of the *soundness of the principles* I am forced thus reluctantly to attack.

voluptati tantum deservientia; quia urbanum prædium *non locus facit* sed materia; proinde *hortos* quoque, si qui sunt in ædificiis constituti, dicendum est urbanorum appellatione contineri.—*Calvini Lexicon, verbo* PRÆDIUM.

* See the learned case of *Stradling v. Stiles*.—Serjeant Catlyne's argument is, I think, rather better than the late president's; but perhaps I may not do justice to the latter, for like Swift's unfortunate reporter, "*Jeo fui disturb en mon place.*"

The common law of England is next resorted to; and I am again challenged to produce a decision under that law, where the right of alluvion to *city property* has been allowed. Having shewn one under the law which governs the country in which the lands lie, I have, I think, done enough; but I am resolved that none of the wretched shifts resorted to shall go unexposed, and that the president of the United States shall not have it to say, that his conduct would have been legal had the land been in England, and he, king of that country.

First, then, I answer this appeal to the common, as I did that to the civil law, by giving the general rule, and calling on my adversary to shew the exception, if it exist. *Blackstone*, speaking of this species of property, even in the strong case of alluvions of the sea, says, "And as to *lands* gained from the sea, either by *alluvion*, by the washing up of sand and earth, so as in time to make *terra firma*, or by dereliction &c.: in these cases the law is held to be, that if this gain be by little and little, by small and imperceptible degrees, it shall go to the owner of the land adjoining."* The same law (he says, a little below) applies to a river. Now as *land*, in the English law, means every species of soil, whether *urban* or *rural*, as a lot of *ground* does not cease to be *land*, although it be situate in a city, I should suppose this general expression would be sufficient to shew, that the king would have no right to the property in question, were it situate in England. But to this Mr. Jefferson gives a most conclusive answer: "In towns, the whole bank and beach being necessary for public use, the private right of alluvion would be inadmissible."† How does it happen then, that in every city in the United States, the shores and wharves are private property, except in the cases where the legislature or the king, may have granted them to the corporations, in which cases they possess and use them as individuals? If they were "*necessary*" for public use, they could never be private property; if the private right of alluvion were "*inadmissible*" it would never exist. But *necessary*, in Mr. Jefferson's vocabulary means *useful*, and *the public*, means those who administer its affairs. Whatever therefore is useful to promote the popularity of the president, is necessary

* 2 Black. Com. 261. † Jeff. p. 40

to the public, and it is in this sense only that his allegation can be reconciled to truth. The question of the right of alluvion to town-lots, has arisen and been decided in the United States. The lands were situate in Newburyport, and the case is reported in Tyng's Massachusetts Reports, vol. 3, p. 353. *Adams* v. *Frothingham*. It was decided according to the common law of England, not by virtue of any state regulation; and the judgment affirmed the right of alluvion to the proprietor of a *town-lot*.

But the whole body of American judges are proscribed; their decisions are no rule for Mr. Jefferson. "Special circumstances (he says) have prevented attention in America either to the law or the breach of it." What those circumstances are which would make learned and upright judges neglect the law, or enlightened magistrates disregard the interests of the public, he has not deigned to explain. But be it so, American decisions shall pass for nothing; there are no bounds to my complaisance for my adversary; every thing shall be yielded to him; titles in Louisiana shall be decided by the laws of England, not as those laws are understood in the United States, as they are expounded by the ignorant men who preside in their courts, but as they flow from the fountain head in good old England itself, and not even there as they are given to us by such inaccurate writers as Blackstone or Coke, who deal in general principles, but we will look for *decisions*, and those relating not only to land, but to land in a *city*, nay, more, to land in a *port;* and to bring the case still nearer home, to a *beach* which is covered not *once* every *six months*, but *twice every day*, with the water not of a river but of the sea, and on which *ships*, not Kentucky boats, ride at anchor. Thus far I shall be enabled to go, but I candidly confess I can get no farther, and if it should be objected to me that my property is chiefly loam and vegetable soil, and that in the case I cite the soil was sea sand, that my alluvion was produced by fresh water, and the English one by salt, or any other distinction equally important should be raised, I confess that I must give up the cause in despair, and avow myself vanquished by the superior resources of my opponent. Let us however do what we can.

I live in a place where there are very few English law books; my means of information therefore are but scanty. I cannot pro-

cure the book from which Mr. Jefferson takes his Scotch case,* and I must therefore take it precisely as he gives it, which (he will pardon me) since the Spanish translation (mentioned above, p. 11.), I am rather loth to do—but even in that statement I think enough may be discovered to prove the truth of my position. Smart was the proprietor of a lot in the borough of Dundee, which was bounded *per fluxum maris* or by high-water mark, but the whole soil below high-water mark, together with the franchise, had been granted to the corporation of Dundee. The king, who owned the whole, had given that part above high-water mark to Smart, and all below it including the river on both sides, to the corporation. The lands gained by the recess then belonged to the corporation, not to Smart, because the space between high and low-water mark belonged to them. Smart was not the riparian proprietor, what was added by alluvion was not to his soil, but to that of the corporation, and this would have taken place were the lands situated in or out of a town. If, instead of granting them to the corporation, the king had granted the lands between high and low-water mark to an individual, that individual would have shut out Smart, and reaped the benefit of the alluvion;—for let it be remembered that by the laws of England the king is, *primâ facie*, the owner of all land between high and low-water mark, both on the sea coast and the arms of the sea. "The shore is that ground that is between the ordinary high-water and low-water mark, this doth *primâ facie* and of common right belong to the king, both in the shore of the sea and the shore of the arms of the sea." Hargrave's Law Tracts, p. 12.—Although the same author adds that such shore may and commonly is parcel of the manor adjacent, and so may belong to a subject.—Now in the case relied on by Mr. Jefferson, Smart's grant was bounded by high-water mark, and the soil which the king had granted to the corporation of Dundee, lay between it and the channel, or perhaps included the channel itself. The corporation therefore took the alluvion, because they, not Smart, were the riparian proprietors, and as the land lay in a *town*, I might tell Mr. Jefferson that his note has

* 8 *Brown. Parl. Cas.* Smart v. Dundee.

furnished me with the very case which his text had triumphantly told me it was impossible to produce.*

Though this case was introduced by my adversary as an illustration of the law of England, it will be no bar to his telling me, as I might him, that it arose and was decided in *Scotland*, and that it is not therefore a compliance with my engagement. Let us therefore try if we can find none in *England* itself.

In the book before cited, (Hargrave, 34) we have the case of an information filed against the tenant of lord Barclay, "setting forth that the river Severn was an arm of the sea, flowing and reflowing with salt water and was part of the ports of Gloucester and Bristol, and that the river had left about three hundred acres of ground near Shinbridge, and therefore they belonged to the king by his prerogative. Upon not guilty pleaded, the trial was at the Exchequer bar, by a very substantial jury of gentry and others of great value; upon the evidence it did appear by unquestionable proof that the Severn in the place in question was an arm of the sea; flowed and reflowed with salt water, was within and part of the ports of Bristol and Gloucester, and that within time of memory these were lands *newly gained* and inned from the Severn, and that the very *channel of the river* did within time of memory run *in that very place*, *where the land in question lies*, and that the Severn had deserted it, and that the channel did then run above a mile to the west."—On the other side the defendant claiming under the title of the lord Barclay alleged these matters whereon to ground his defence.

1. That the barons of Barclay were from the time of Henry the Second owners of the great manor of Barclay.

2. That the river of Severn was *usque ad filum aquæ*, time out memory, parcel of that manor.

3. That by the *constant custom of that country* the *filum aquæ* was the common boundary of the manors on either side of the river.

* I invite the reader to examine this case, for I strongly suspect that the only *quotation* which Mr. J. gives from it, and which he introduces with his expression "*the book says*", is nothing more than the marginal note of the purport of the case; generally the work of the editor, sometimes of the printer. If so, he might as well quote the index, but his expression would in that case have a *curiosa felicitas*—it would then, indeed, be the *book*, but not the author *which says*.

" When this state of the evidence was opened, it was insisted upon that the river in question was an arm of the sea, a *royal river and a member of the king's port*, and therefore that it lay not in prescription to be part of a manor; but the Court *overruled that exception*, and admitted that even such a river though it be the king's in point of interest *prima facie*, yet it may be by prescription and usage time out of mind parcel of a manor."—The defendant then went into his proofs, but as he was proceeding "The Court and king's attorney general, sir John Banks, and the rest of the king's counsel were so well satisfied with the defendant's title that they moved the defendant to consent to withdraw a juror, which, though he was very unwilling, yet at the earnest desire of the Court and the king's counsel he did agree thereunto." " So that matter (says the learned reporter) rested in peace, and the lands &c. are enjoyed by the lord Barclay and his farmers quietly and without the least pretence of title to this day"—"This I know, (adds he,) for I was thoroughly acquainted with this case, and attended at the bar at the trial," and I may draw my inference in his words—"This great and solemn trial for the right of a royal river *in a port and part of it* doth fully prove that which I had to say touching this matter."—It will scarcely be necessary to remark that though this case is one of a claim by prescription, it cannot be stronger than one like mine by grant. There was no prescription for the soil in question, that is expressly (in the case) stated to be " newly gained from the Severn," within the memory of man.—See also in the same book p. 56, 57, the case of Sutton Poole at Plymouth, where thirty acres of land were adjudged to belong to the king *as part of a manor*. The premises are thus described: " There lies adjacent to this town (Plymouth) within the Barbican there a space of about thirty acres which is *covered every tide with the sea, and ships ride there* and come to unlade at the keys of Plymouth.—This is mentioned, says lord Hale, the rather because the property was recovered by the crown, not" " *upon any prerogative title*," " but as parcel of land belonging to a manor *that once was a subject's*."

These cases I think must clearly evince that in England as well as in countries governed by the civil law the " whole bank and beach in towns are *not* necessary for public use" as our author has asserted, but are frequently vested in individuals,

and that there is no more foundation in the common than in the civil law, for the distinction that has been made between *city* and *country* property on this subject.

I will now admit with Mr. Jefferson that in most instances in Europe and some in America, when towns have been established on public lands, the town lots have no right of alluvion; but the reason flows from the very principles I endeavour to establish, it is because the public is and individuals are not the riparious owner; all the land belonging to the sovereign, he grants lots by metes and bounds. These become *agri limitati* and are not entitled to the alluvion, but he, (the sovereign,) retaining that part bordering on the waters is the riparious proprietor, and he, therefore, or the corporation of the town if he grant it to them, (as in the case of Dundee) becomes entitled to the right of alluvion as an accessory to his riparious property.

Just so when a town is established on the lands of an individual; all the lots which he sells are bounded by the streets and have precise limits. The rest remains his property, and he retains it with all its accessories; should it be land bordering on a river, he has the right of alluvion, and should he lay out a street, the lots of which are bounded on the river, the grantees of those lots will enjoy the same right.

This is precisely Gravier's case; he owned the whole land to the water's edge, he laid out a part of that land into lots, bounding them by precise limits, and referring for those limits to the plan.—All that he did not sell he retained; in some instances he sold the batture with the lots, and by that act he bounded those lots on the river; in these cases the grantee is entitled to the alluvion; what he did not sell he of course retained, and was himself entitled to the increase.

But it seems to me rather an extraordinary idea that merely by selling some lots on a plantation and calling it a suburb, the proprietor should by a kind of legal legerdemain lose his property in a valuable tract, *which then existed* in front of those lots, and deprive himself of all the future increase. The existence of this land at the time of laying out the suburb is not only stated in the judgment, but is *expressly acknowledged* by one of the most able and zealous advocates for the title of the United States. Two of those gentlemen disagreed as to the principles on which their cause could be best defended, a very natural

occurrence when the cause is not clear. One of them admitted candidly that Gravier's ancestors had a right to the alluvion not only by the French but the Spanish law; but very ingeniously attempted to destroy their title on other principles. This his fellow-labourer in the same field considered as a dereliction of the cause and says: "If that were true no resource would remain against Mr. Gravier but to prove that at the time of the establishment of the suburb, there was no portion of the batture sufficiently consolidated to be susceptible of being thus incorporated with the estate.—*But the contrary has been ascertained* and it is probable that it may still be proved."—Yet with the evidence of this admission before him, together with that of the affidavits which he so frequently quotes, all of which speak of its existence at a period long anterior to the establishment of the suburb; with all this before him, Mr. Jefferson affects to treat the property in question as a non-entity at that period, and speaking of Gravier as the owner of the *road only*, asks these sensible questions: "Did any one ever hear of a man's holding the bed of a road and nothing else?" "Is it possible to believe that B. G. in selling his lots *face au fleuve* really meant to retain the bed of the road and levée?" If this be fair honest reasoning, if this be a candid appeal to the public, if such subterfuges and concealments are admitted in argument, I have entertained very false ideas on the subject—nor could I conceive that the first magistrate of our country would rest the defence of his conduct on so poor an artifice as this. The alluvion could not accrue to Gravier, because Gravier had nothing after he sold his front lots, but the *road* and the *levée!* Mr. Jefferson tells us this, the same gentleman who told congress in enumerating and describing several parcels of ground in and near New Orleans, that there was beyond the levée a "parcel called the batture which had been *used immemorially* by the city to furnish earth for the streets &c. and as a landing or quay," &c. If it had been used *immemorially* by the city it must have existed when the suburb was laid out, and if it existed then, there was something besides *the road and the levée* for Gravier to retain, and Mr. Jefferson has put it upon the records of the nation that he knew this, and now he does not hesitate to argue to that very nation as if he disbelieved or had never heard of its existence.—But take away the batture and the argument will not be a whit the better. If Gravier owned

the soil of the road, although the use of that road for the purpose of passage was in the public, the accessory would be his, subject, says Mr. Jefferson, to the same uses and servitudes—that is to say, that because the public have a right of way fixed by law to the breadth of forty feet over Gravier's land, when Gravier's land is increased to five hundred feet the *whole* shall be *road*. The use of such means of defence I believe will be considered as evidence of the most deplorable want of better materials. But even admit this, and what follows? Why, that the road, though five hundred feet wide, was still *Gravier's;* nothing gave it to the United States, and if he disturbed the public in the use of this broad way, the local authority would punish the offence, but the president acquired no right to seize upon it as lands belonging to the United States.

III. We are next presented with a new ground of defence, this land, which through forty pages of the book has figured as an alluvion, which has been seized upon because the laws of France *give alluvions to the king*, is now an alluvion no longer. Mr. Jefferson most manfully asserts, (page 42), that he "DOES *deny* to the batture *every characteristic* of an alluvion," and the process by which he supports this stout assertion is edifying and curious. Let us examine it with the attention so rare an operation deserves.

It is not alluvion: first, because the accession by alluvion must be *insensible;* and the increase of the batture may be perceived; every swell of six months "is said to deposit nearly a foot of mud, and when the waters retire, the increase is visible to every eye;" and "a single tide (meaning, I suppose, annual inundation) extended the batture from seventy-five to eighty feet into the river, and deposited on it from two to seven feet of mud." Here is indeed a rare discovery! If the increase can be perceived on the retiring of the waters, it is no alluvion; this takes away one of the first characteristics in his own definition. It must be *incrementum:* an augmentation, an increase; and if an increase, it must, of course, be perceived, it must be sensible to the eye after it is made, or it would never become the object either of property or discussion; yet according to our learned author, if we can see it after it is formed, it is not alluvion. I am astonished at so palpable an error, or so gross an attempt to mislead; it is found-

ed on an ingenious contrivance of amalgamating all the words of different definitions, and from the mixture producing a *tertium quid*, to be found in neither. The word *insensibly*, is to be found in none of them, nor any equivalent word, in the sense in which Mr. J. employs it. It is "incrementum *latens*," a secret increase, that is hidden during its formation, as we gather from the remainder of the sentence:—"quod ita paulatim adjicitur, ut intelligi non possit, quantum quoquo *temporis momento* adjiciatur;"—"which is so gradually added, that we cannot know how much is added in *each moment of time*." All this relates to the process of formation. In order that it may cease to be alluvion, we must know, not how great the increase has been when the water has retired, but how much has been deposited in each *moment of time*. When Mr. Jefferson can solve this problem, as respects the batture, I will acknowledge that it is no alluvion;* but let him be the sponsor, and call it by any name he chuses. The truth is, and Mr. Jefferson well knew, and every man who has read a word on the subject must know, that this branch of the definition is to distinguish *alluvions* from *avulsions*,† or the sudden removal of large bodies of land by the force of a torrent, the law giving the latter to the proprietor from whose lands they were torn; and had Mr. Jefferson given the people of the United States credit for a particle of understanding, he would never have addressed to them so extraordinary an argument as that alluvion ceases to be alluvion, the moment you can discover to what extent it exists. Let us proceed with the trial of this *misnomer*, as our author calls it.

* This argument is not new; it was urged before, and I gave the following answer to it:— "When the ingenious counsel can analyze the different deposits, separate the sands of the red river, and the rich mould of the Missouri, from the clay and other various soils which the Mississippi receives from a thousand tributary streams—when he can dive into its turbid eddies, watch the *moment* of the precious deposit, and date the existence of each stratum of its increase—then this first branch of the authority he has cited, may be applicable to his cause."—It would be treating Mr. J. too much in the style he has most wittily and facetiously treated me, (p. 12.) to recommend a similar immersion to him.

† After defining alluvion as an *incrementum latens*, Vinnius adds, "Ex quo crescit hujus acquisitionis æquitas nimirum quod quæ alluvione accedunt ita lentè et obscurè detrahentur ut intelligi non possit, *si forte de his restituendis quæratur, quorum prius fuerint aut quibus detracta.*"—Vinnii Com. in Inst. lib. 2. tit. 1, § 20.

It is, secondly, no alluvion, because alluvion is created by "*apposition* of particles of earth;" but the batture has been created by *deposition*. Now the reader who wants to find this word in any of the definitions, either Latin, Greek, French, English or any other language, will be disappointed. It is created by a curious process, which is highly instructive. The original Latin is *incrementum latens;* here we find nothing about *apposition;* but this, we are told, has been translated by Theophilus into Greek, and that he calls it "*Prosklusis* and *Proschōsis*," which *prosklusis* and *proschōsis* are brought back again into Latin by Curtius, under the names of *adundatio* and *ad-aggeratio*. Here you see we have got *incrementum latens*, thanks to Theophilus and Curtius! back again into Latin; but so changed, that the father of the phrase himself would hardly know his child. But this is not all: the unfortunate word is not yet released from the torturing hands of these magicians; after the Latin comes the American conjuror—another metamorphosis is to be made; he creates two potent words for the purpose, and presents us with *adundation* and *ad-aggeration;* but as all his readers might not understand this new vocabulary, he changes *ad* into *ap*, *unda* into *posi*, and *adundation* becomes *apposition;* and thus *incrementum latens* having gone through the hands of Theophilus, Curtius and Jefferson, comes out, "*apposition of particles of earth.*" I am deceived if there was ever a more ingenious process; a troublesome word in a definition or a text, may, by the aid of a few translations and re-translations, be made to mean any thing we please; and the instance stated in the note, shews that it has once before been applied with success to effect a change of name.* It is unfortunate too for our author, that none of these

* An unfortunate Scotchman, whose name was *Feyerston*, was obliged, in pursuit of fortune, to settle among some Germans in the western part of New York. They made a much better *proschōsis* than Theophilus did; they translated him *literally* into German, and called him *Feuerstein*. On his return to an English neighbourhood, his new acquaintances discovered that *Feuerstein* in German meant *Flint* in English. They re-translated instead of restoring his name, and the descendants of *Feyerston* go by the name of *Flint* to this day.—I ought however to except one of his grand-sons, who settled at the Acadian coast, on the Mississippi, whose name underwent the fate of the rest of the family: he was called by a literal translation into French, "*Pierre à fusil;*" and his eldest son returning to the family clan, underwent another *prosklusis*, and was called *Peter Gun*.

terms, either in Greek or Latin, have the meaning he has given them. I speak of *apposition*, which being English, I understand; as for *adundation* and *ad-aggeration*, which he has formed by adding an *n* to the Latin termination, as this does not, I think, give them a legitimate place in our language, I must consider them still as Latin, and tell Mr. Jefferson, which I do with great deference, that the first means simply *alluvion*, (see Godfrey, note on Dig. 41. 1. 7.) and the second means the action of heaping up, of raising a mound, and is derived from *ad* and *aggero*, which last word comes from *agger*, an accumulation, a mound, an heap of earth, not *ager*, a field. *Agger arenæ*, Virg. an heap of sand: so that if alluvion is *ad-aggeratio*, it is a *de*position, not an *ap*position. The other word, *adundatio*, conveys, from its etymology, the idea, that the increase was made by the action of the water; so that the whole of this translation and re-translation is perfectly labour lost; and even with the aid of Theophilus and Curtius to boot, we cannot make alluvion to mean *ap*position of particles of earth. Indeed, the idea is one of the most extraordinary that are to be met with in this extraordinary book. That the river is to *plaster* the sand, upon a perpendicular bank, as the mason plasters the walls of a chamber, and that it must adhere there, or it loses its name, it is no alluvion*—what shall we say to such fancies? That they are more ridiculous, but intrinsically quite as good as any of the other reasons that have been urged by our author in justification of his condnct.

Thirdly, we are told it is no alluvion, because it is not formed *against* the adjoining *field*, so as to make a *part of it*. Throwing the quibble on the word *field* out of the question, I would ask, how it is proved that this increase is not consolidated with the adjacent land? In the first place, we are presented with the levée and road, as forming a breach in the "continuity;" but as I have shewn that the road and the levée are *land*, and that land the *property* of the person under whom I claim, they do not break the continuity; on the contrary they preserve it. Next, "There is no extension of its surface, so as to form one with the former surface, so as to be a continuation of that surface, so

* The deposition of earth on the bottom of a river, can no more be said to be an apposition to its sides, than the coating the floor of a room can be said to be plastering its walls.—*Jeff. p.* 44.

as to be arable like that." I quote literally here; because being not quite certain that I understand what is meant, I wish my reader to judge for himself. *No extension of a surface so as to form one with a former surface, so as to be a continuation of it, so as to be arable like it!* If by former surface, is meant the former surface of the batture, I agree with Mr. J. it does not form *one with it*, it is not a *continuation of it;* because the present surface is some feet higher than the former was many years ago; but then I do not see how this can be required as the characteristic of a species of property, which only grows into existence by yearly changing its former surface. He must mean by former surface, that of the land to which the alluvion is annexed; but on this supposition, I am equally at a loss to understand the phrase; he does not surely mean to present us here again with the idea, that the extension of the surface was broken by the road and the levee, because this last argument is introduced by the words, "even supposing the continuity not to be broken by the intervention" of these objects. Taking away then the levee and the road, what is there to prevent the extension of the surface? what other object intervenes to interrupt it? None: for we are told in the next sentence, that it *abuts against the bank;* if so, there is a continuity of surface; nor is it interrupted even if the fact were true as asserted, that this surface "is below the level of the *adjacent field:*"* unless our learned author will call on Theophilus and Curtius, to help him to a new feature in his definition, and require all alluvions to be on a *level* with the adjacent field. Without their aid we are however presented with a new one:—"*It* (the batture) *is not arable like it,*" (the *former* surface) meaning always, I presume, the original soil. To be alluvion then, it must be arable land; pasture land, meadow land, wood land, will not do. It must be *arable*, and arable *like;* that is, I suppose, in the same manner with the original soil. But how if the original soil be not arable? How if it be woodland? must the alluvion, to be alluvion, be *like* it in this respect also? Must it start out of the bosom of the waters,

* Observe here how our author has unwittingly done homage to truth, and contradicted his own sophisms on the word *ager*, by calling the property to which he denied any of the characteristics of this word, the *adjacent field.*

False reasoners, as well as others of a worse description, should have good memories.

covered with full grown trees, that it may make, "*un tout avec la terre voisine?*" How if the alluvion should unfortunately, as it some times is, be composed of *barren sand?* Can no property be acquired in it? Must it be, as our author tells us, "fit for the the same use?" and if the alluvion, annexed to my cane-field, cannot produce canes, am I forbid to pasture it? What shall we say to this train of reasoning? What shall we think of the cause, that obliges a man of the late president's standing to recur to such arguments? If they provoke a smile even from the man who has been ruined by their application, certainly no indiffetent reader can peruse them, without a broader expression of mirth.

Having shewn how utterly inconclusive Mr. Jefferson's reasoning is, even on his own statement of facts, I pray the reader to cast his eyes on the levels contained in plate No. 1, fig. 2, and he will find that a very great proportion of the property in question, is *as high as any* part of the original soil in its natural state; and that all of the alluvion, to within a few feet of the river, is much higher than all that part of the plantation back of the lots; that is to say, higher than three fourths of the original soil.

Let me desire him to remember Mr. Derbigny's acknowledgement, that IT HAD BEEN ASCERTAINED, "that at the time of the establishment of the suburb, a portion of the batture had been sufficiently consolidated, to be susceptible of being incorporated with their (the Graviers') estate."

Let me refer to Mr. Jefferson's own acknowledgement of the fact, (p. 61) that at a very *early period* it was so far consolidated, that buildings were erected thereon, which the Spanish Governor ordered to be pulled down.

Let me invoke the judgment of the superior Court deciding this fact, that "from the evidence in the cause it appeared, that antecedent to the time when Bertrand Gravier ceased to be the proprietor of the land adjacent to the high road, a batture or alluvion had been formed adjoining the levee, in front of the Fauxbourg, and extending the whole length of the Fauxbourg upon the river; and that this alluvion *was then of sufficient height to be considered private property*, and had consequently become annexed to, and incorporated with the inheritance of Bertrand Gravier."

And let me ask any unprejudiced man in which we are to place the most confidence, Mr. Jefferson's assertion of fact, or his deductions of law?

Having shewn in the most satisfactory manner, as he thinks, that this property is not alluvion, he kindly undertakes to tell what it is.—And what, courteous reader, do you suppose it may be?—Nothing else than a part of the *bed;*—yea, of the very *bed* and *bottom** of the river Mississippi. In support of this strange assertion we are again favoured with a great deal of etymological learning; but as usual with our author, much of it false, and all inapplicable. The Romans, in defining the word river, said that it consisted of "banks, a bed and water." The moderns it seems, with greater accuracy, distinguish, by an appropriate name, that "*band*" which lies between high and low water mark. This Mr. Jefferson says is part of the *bed* of the river; in English it is called *beach*, which is derived from the Anglo-Saxon *beotian*,† to beat—

In Spanish *playa*,
In Italian *piaggia*, } from the Greek *plaga*, a stroke.
In French, *plage*,

* Mr. J. makes use indifferently of these two expressions. "The deposition of earth on the *bottom* of a river, &c. p. 44. And in his Message to Congress, of the 7th of March, 1808, he describes the batture to be 'a shoal or elevation of the *bottom* of the river.'

† Our author is very careful to inform us that this word must be pronounced *beAchian:* it is a necessary caution; some wicked punster might otherwise pronounce it as it is written, beotian, and apply it to an etymological research, in the maze of which a great genius had been bewildered. I will not assert, that this Saxon word is manufactured for the occasion, because I have not the means here of ascertaining the fact: but I strongly suspect it; and for this reason: Johnson derives the word *beat*, not from *beatian*, as I think he would have done, had that obvious root existed, but from the French *battre;* and this last word, the Dictionaire de Trevoux derives from the Latin *batuo.*—Since writing the above note, I have been favoured with an extract from Hickes's Anglo-Saxon Grammar, in which the English verb *to beat*, is rendered *betan*, and *beotan;* the *i* it seems has been introduced, to give some colour for making it the root of *beach;* because, according to Mr. Jefferson, it is very clear that the Anglo Saxons had adopted Dr. Sheridan's rules of pronunciation, and that their German idiom was sounded exactly like the modern English; and therefore, the word *beatian* or *beotian*, must, in the time of king Ethelwolf, have been pronounced *beachian*, precisely as the words *christian, fustian, question*, are now pronounced *christchian, fuschian, queschion*, &c. See Jeff. p. 45.

Batture also comes from *battre*, to *beat;* therefore *batture* means a *beach;* therefore it is not *alluvion*, which was to be demonstrated. By the very same process I could prove it to be a battery, a battalion, a battering ram, or any other object derived from the same root. But in the first place, *batture* is not a *beach;* it is a term to be found in none of the editions of the French Dictionary of the academy, up to Smitt's inclusive, in the year 1799. It is, however, a word in general use on the Mississippi, and has a meaning here, as well defined as any other in the language. Of this Mr. J. had he been inclined to manage this controversy with the dignity which became his station, and even with the candor necessary to preserve appearances, would have acknowledged; because he knew, that until he suggested the quibble of calling it a *shoal*, all those engaged in the controversy called it an *alluvion*, and defended the public right to it as such. To prove this, take the first page of that very Opinion on which Mr. Jefferson grounded all his proceedings; that very Opinion with which the attorney general says his coincided—the Opinion of Mr. Derbigny:—

"Having considered the above statement of the case, together with the documents relative to the *batture* or *alluvion* there referred to, and the testimony heard in the suit between Jean Gravier and the corporation of New Orleans."

"The undersigned counsel is of opinion that the said *batture* or *alluvion*, is a property formerly royal, which passed from the crown of France to that of Spain, and belongs at present to the United States."

"This opinion is founded on the following reasons:

"1st. *Alluvions* on navigable rivers belonged to the king of France.

"2dly. The plantation bordering on the limits of the city of New Orleans was sold by the king of France in 1763, when the *alluvion situate in front of that land* was already in being.

"3dly. Between the *alluvion* and the land sold, lay a royal road (the same that still exists) and a levée, both which were then and have still remained public property.

"4thly. The *alluvion in question* has never ceased to be a royal property, the enjoyment of which the French and Spanish governments at all times left to the public, and on which they constantly hindered private individuals from encroaching.

"5thly. Neither Jean Gravier nor those from whom he derives his title, ever were in possession of the *alluvion;* and Bertrand Gravier himself, at the time of his settling a suburb in front of his plantation, declared that he had no claim to the *alluvion.*"

Here, I think, is abundant testimony that *batture* and *alluvion* were at one period at least of the controversy considered as synonymous, and that too by a person better qualified to give the signification of a local term than an inhabitant of Virginia; and that its signification was not restrained to an alluvion covered with water during some part of the year, we learn from the same source, page xxvi. Mr. Derbigny says: "It is evident that when France ceded Louisiana to Spain, the right of the king of France to the property of all the alluvions then formed on the Mississippi was conveyed to the king of Spain, and that if the king of Spain had thought proper to avail himself of that title, he might have remained proprietor of all those new grounds.

"The king of Spain, through liberality towards his subjects, left the inhabitants of the borders of the river, in general, the quiet enjoyment of those new grounds; and for the encouragement of agriculture in this colony, which was as yet in its infancy, he constantly permitted them to be converted into cultivated fields, not even at any time hindering the proprietors of plantations in front of which they were formed, from altering the site of the high road, in order to take possession of them. Hence it follows *that the battures already formed* at the period of the cession of this colony to Spain are now become the property of the riparious inhabitants by right of long possession, as securely as those formed since are their property by the Spanish laws."

Here, certainly, is the strongest evidence of a notorious fact, that *batture* in the common parlance of the country means that part of the land which has been gained from the river, even after it has been diked in and reclaimed; and it is equally notorious, that in inquiring the value of a plantation, the first question is: Is it *batture* or *écor?*—the first designating those lands which are increasing by the action of the river, the last those that are losing by it;—and this, I repeat, Mr. Jefferson knew. Let us, however, proceed with his etymological proof.

I have shewn that *batture* does not mean "*that band or margin of the bed of the* RIVER *which lies betwixt high and low-water mark.*"—Do the other words which he has supposed to be derived from the same root designate that idea?

Plage in the French, is derived, says the Dictionaire de Trévoux, from the Latin *plaga*, from the Greek *plax*, *plagos*, *flat*, *smooth;* and to a similar source may be traced the French word *platin*, which also means *beach*, and which Mr. Jefferson would fain derive from the Greek *plettein*, percutere, to strike; but afterwards confesses with a *perhaps*, that it may originate from the French *plat*, flat. Jefferson, 45. Whatever may be its derivation, it does not signify the shore between high and low-water mark, but that part of it above the reach of the wave. "*Plage* rivage, de la mer plat et *découvert.*" Shore of the sea flat and *uncovered.* Dict. Acad.

Playa in Spanish has the same signification, and is translated by the word *plage* in French. And *piaggia* goes further still, for it is "a strand or *high shore.*" Barettis' Dict.

So that if Mr. J. will have the batture to mean *plage*, *playa*, or *piaggia*, we find that so far from signifying the *band or margin* which lies *below* high-water mark, its meaning is expressly the contrary, and that in Italy, Spain and France, it lies out of the water's reach. Was the member of the National Institute ignorant of the signification of these terms, when he employed them? or did the upright republican magistrate strive to deceive his *masters* by the misuse of foreign terms, when he was shewing them that "*their servant had done his duty*"?

It is not therefore extraordinary that Mr. Jefferson could find in Latin "no term which applies exactly to the *beach* of a *river.*" A faithful translation was all that was wanted to shew that he would find it in no language, in none at least of those he has quoted, or of the very few others with which I am acquainted.

But, though they happen to be in my favour, I am ashamed of these cobweb arguments, half hidden in the darkest nook of antiquity. Their texture can only be discovered through the *night-glass* of the etymologist, and then so doubtfully and obscurely that no certain conclusions can be drawn from the research; and I should be extremely sorry that my case were to depend on shewing that *beach* is derived from *beachian* or *beo-*

tian, or *plage* from *plegeis*. Upon the whole, I dismiss the chapter of etymologies by referring the reader to Swift's ingenious attempt to shew from the names of Homer's heroes, that the English language was spoken at the siege of Troy; and I apply to Mr. Jefferson on this point what Johnson says of Wallis, that "his derivations are so made that by the same license any language may be deduced from any other."*

The object of all this research is to shew that the property in question, lying between high and low-water mark, is part of the *bed*, not part of the *bank* of the river, that the bed of the river is *public property*, and that consequently this belongs to the public.—But has he forgotten, or does he think that his readers have forgotten, that the bed of the river is only public while covered with water—that it is not a public property in the soil, but only a public use—a servitude of navigation. "Riparum quoque *usus* publicus est jure gentium sicut *ipsius fluminis*." "*The use* of banks is public in the *same manner* as that of *the river itself*." Inst. Lib. 2. Tit. 1. s. 4.

See also Vinnius' Commentary on this passage.

But as soon as the water is removed, the *bed* becomes the property of the adjacent proprietor, according to the following, among other, authorities:—"Quod si toto naturali alveo relicto, flumen alias fluere cæperit: prior quidem alveus eorum est qui propè ripam prædia possident."—"If the river, leaving its natural bed, shall flow in another channel, the former channel is the property of those who own the land on the banks." Dig. 41. 1. 7. § 5.—The same provision is made by the Law of the Partidas, 3d part, tit. 28, law 31, almost in the same words:—"Mudanse los rios de los lugares por do suelen correr, e fazen sus cursos por otros lugares nuevamente, e finca en seco aquello por do solian correr: e porque puede acaecer contiendas, cuyo deve ser aquello, que assi finca, dezimos que deve ser de aquellos, a cuyas heredades se ayunta; tomando cada uno en ello tanta parte, quanta es la frontera de la su heredad de contra el rio.

* I have heard of an etymologist who derived the name of the river *Potomac* from the Greek *Potamos*. This derivation is quite as probable as that of *beach* from *beotian;* being founded on a much greater similarity of sound, as well as analogy of sense.

E las otras heredades por do corre nuevamente, pierden el señorio dellas aquellos cuyos eran, quanto en aquello por do corren: e dende adelante comiença a ser de tal natura, como el otro lugar por do solia correr, e tornase publico assi como el rio."

And to come to the law of France, which it is said must be the criterion, we have, on this particular point, first, the opinion of the tribunal of Rouen, above quoted, "that the *river itself* is not a *national domaine*, but a thing of which the public have *the use*. It belongs to the nation, not in full property, but as an appendage of its sovereignty;" and conformably with these principles, we have the following decisions:—

"Il a été rendu depuis peu d'années (say the parliament of Bordeaux, in one of their Remonstrances) quatre arrêts solemnels du conseil de la grande direction, par lesquels il a été jugé que des terrains près des bords des rivières affluentes à la mer, et *couverts périodiquement par les eaux de ces rivieres, lors du flux et reflux*, ne font pas partie des rivages de la mer, et qu'ils appartiennent en toute propriété aux particuliers qui les possèdent; les deux premiers de ces arrêts des 6 Août. et 13 Dec. 1771, ont declaré patrimoniaux les marais et grèves* d'Apdeville et d'Amfreville sur lesquels le *flux de la mer se porte régulièrement dans les hautes marées*. Le troisième du 27 Juillet, 1778, rendu au profit du seigneur et des habitants de Salnelle a annullé une concession, surprise en 1765, du marais ou commun de Salnelle, situé sur la riviere d'Orne, *qui est baigné périodiquement par les eaux de cette riviere dans les hautes marées* et ce, nonobstant deux arrêts du conseil des finances par les quels ce seigneur et ces habitants avaient été déboutés de leurs oppositions à cette concession.—Le quatrieme du 12 Août. 1782, sans s'arreter à des fins de non-recevoir proposées par le Marquis de Courcy, concessionnaire, a ordonné l'exécution d'un arrêt du 21 Mars, 1770, qui avait déclaré la concession obreptice et subreptice, et avait jugé que la grève de Brevart n'était pas un bord et rivage de la mer, *quoique le grand flot de Mars*

* Lieu uni et plat, couvert de gravier et de sable, le long de la mer ou d'une grande rivière. *Dict. Acad.*—A smooth or flat surface, covered with gravel or sand, along the sea or a great river.

s'y portât. Ces quatre arrêts sont cités dans un mémoire imprimé, présenté au conseil dans l'affaire entre Monseigneur le Comte d'Artois, le sieur Tardif de Mondesir, les héritiers Lahouger et autres parties."— "Four solemn judgments have been had, within a few years, in the council of the *grande direction:* by which it has been decided, that lands, situate near the banks of rivers flowing into the sea, and *covered, periodically, by the waters of these rivers*, at the time of the flux and reflux, are not a part of the strand of the sea, and that they belong to the individuals who possess and improve them. The two first of these judgments, of the sixth of August and thirteenth of December, 1771, adjudge, as estates of inheritance, the meadows and beach of Apdeville and Amfreville, *which are covered regularly by the flux of the sea in high tides.* The third, of the twenty-seventh of July, 1778, given in favour of the lord and inhabitants of Salnelle, annulled a concession, obtained in the year 1765, of the meadows or commons of Salnelle, situate on the river Orne, *which are covered, periodically, by the waters of that river, in the high tides;* and this, notwithstanding two sentences of the council of the finances, by which this lord and the inhabitants, had been foiled in their opposition to this concession."

"The fourth, of the twelfth of August, 1782, notwithstanding the pleas in bar, offered by the marquis of Courcy, the grantee, ordered the execution of a sentence of the parliament of Rouen, of the eleventh of March, 1770, which had declared the concession surreptitiously obtained, and had adjudged, that the beach (grève) of Brevart, was not a strand or shore of the sea, *although it was covered by the spring tides*, and, consequently, maintained the lord and inhabitants in their possession."— These four judgments are cited in a printed memorial, presented to the council, in the suit between the count d'Artois, the sieur Tardif de Mondesir, and others.

Let me now bring to the recollection of the reader, the description of the premises in the decisive Bordeaux case. They are said to be, "les bords ou le *rivage* de la rivière de Gironde;" and it is expressly stated, that "ils sont atteints par celles (les eaux) que la rivière y porte dans les grandes marées;"—"the banks or beach (strand) of the river Gironde, which are reached by the waters which the river carries there in high tides."— Now the object in dispute in all these cases, was precisely Mr.

Jefferson's "*band* or *margin* of the bed of the river, which lies between high and low water mark;" yet the courts uniformly declare it to belong to the adjoining proprietors; and the king, in the last case, formally confesses, that he never had any title or pretension to property of this description.

But why multiply authorities, or cite decisions to refute what my adversary refutes for me himself, and shews by his own reasonings and definitions, to be wild, fanciful, I had almost said absurd.

He acknowledges that there is alluvial property, and that it must be formed by the "*apposition*" of particles of earth to the *adjacent field*, that is to say, to the field which is *adjacent to the river;* but if this *band* or *margin*, which he tells us, in the present case is two hundred and forty-seven yards wide—if this *band* or *margin* always separates the field from the river, how is it *adjacent?* or in what manner can the particles of earth be transported across this margin, so as to be *plastered* (as he terms it) against the banks? Let it be remembered, that this band, margin, or beach, lies between the highest periodical inundation and the lowest water; but as the water can carry nothing farther than itself extends, all its deposits, all its *appositions* must of course be on this margin; which being public, the soil deposited on it must be so too; and this *band*, *margin* or *beach*, however increased in height, would always exist to prevent the extension of the field one single line towards the river. The conclusion then would be, that there can be no alluvion; which is defined by our author himself to be, "*the extension of the field added by the waters.*" This new-fangled idea, then, would utterly destroy the ground-work of his own definition; and the only part of it, as I have shewn, that is not as fanciful as his public property, in the aforesaid *band*, *margin* or *beach*.

The most curious part of all this reasoning is yet to come. The space between high and low water-mark is not part of the bank, but of the bed of the river. Why? because a bank is defined in the Roman law to be, that which *contains* the river when fullest —"Ripa ea putatur esse quæ plenissimum flumen continet;" and in the Spanish—"La ribera del rio se entiende todo lo que *cobre* el agua de el, quando mas crece en qualquiera tempo del año, sin salir de su yema y madre." Cur. Ph. The translation of which is,—"By the bank of the river we are to understand, all

that *its water covers* when it is most swelled, without leaving its channel or bed." Now taking these two definitions together, and I allow them to be correct, what is the bank? That, says the first, which contains the fullest river; that, says the second, which the waters of the fullest river *cover*, when it does not overflow. Now I ask any man of common sense, whether these two definitions do not apply exactly to Mr. Jefferson's *band.* What is it that contains the *fullest* river? The space between high and low water-mark. What contains the river at its lowest? That which is below low water-mark. What is *covered by the water of the river when most swelled?* Precisely the same space between the high and the low water-line. What is covered by the water of the river when it is not swelled? The bed, or that part which is below the low water-line. All above *low* water-mark, therefore, by the very words of his own authorities, is *bank;* and as he has been at great pains, with what success we shall presently see, to prove that this is the position of my property, he has proved it to be the *bank*, and not either the *bed* of the river or its *beach.*

I am here forced to remark a recurrence of one of the circumstances which render this controversy extremely unpleasant. Reasoning of every species I ought to be prepared to meet; if fair and unanswerable, I must yield to its force—if specious only, I must detect its sophistry. Of false reasoning, therefore, I ought not to complain; but I protest against false translations. They are destructive of the good faith which ought to reign even among the most virulent disputants; and deceive those, who confide as well in the author's integrity, as in his ability to render faithfully all the texts which he may cite. A single instance it would be uncandid to characterize thus seriously, even if it were important; frequent instances might be passed over in silence, if they were not very material; and both in the one and the other case, they might be ascribed to ignorance of the language, if the author did not profess an acquaintance with it, and, what is more important, if he had not before him faithful translations of the very passages he perverts. But when the false version is so important as to be made the basis of an argument, where it occurs more than once, and where the author not only understands the language, but is guided in the interpretation of the very passage, by an able and strenuous advocate in the same

cause;* under such circumstances, I confess I can feel no indulgence, and admit of no excuse. Without the fear, therefore, of being deemed uncharitable, I proceed to detect a second attempt to impose on the public by a false translation from a language, little understood by the readers of his book.

Mr. Jefferson is endeavouring to prove that the space *between high and low-water mark* is not the *bank*, but the bed of the river. If he had told his English reader that the Spanish authority on which he most relies, declared "all that to be the *bank*, which was *covered* by the waters of the river in their highest swell;" he was well aware that he might have been answered, "Your authority proves the reverse of your proposition, the space between low and high-water mark being covered by the waters of the river, when at their highest swell, is precisely that which your authority calls the *bank;* how then can you tell me it is the *bed?*"—To avoid this difficulty our author, without scruple, changes the phrase in a material part, and translates the authority, so as to make it say, "The bank of a river is understood to be the whole of what *contains* its water when most swelled." The Latin and French authorities describing the shores of the sea (*littus*) admitted of a wretched quibble. Littus est *quousque* maximus fluctus a mare pervenit. Dig. 50. 16. 96.

Est autem littus maris *quatenùs* hibernus fluctus maximus excurrit. Ins. 2. 1. 3.

Sera reputé bord et rivage de la mer, tout ce qu'elle couvre et découvre pendant les nouvelles et pleines lunes, et *jusqu'où* le grand flot de mer cesse de se faire sentir. *Boucher.*

These passages all describe the shore to extend *as far as* the highest waves of the sea. This seems to be tolerably plain, and to define with sufficient certainty all that to be the shore of the sea which was sometimes covered with its waves; but Mr. Jefferson in his deductions reverses the sense of the phrase, though he translates it truly, and construes the *quousque*, the *quatenùs* and the *jusqu'où* to mean *down to.* That, according to him, is shore which lies *above* the high-water mark, all is bed *below* it. But the Spanish passage gave no reason for this fine spun construction, it expressed the same idea in other words and told

* Mr. Thierry (Exam. p. 17) thus translates this identical Spanish passage: "The *bank* of a river *comprises* all that its waters *cover,* when at their *highest* swell, at *any time* of the year whatever, without going out of its bed."

us expressly that the bank was that which was *covered* by the water when it was most swelled without actually overflowing; it was therefore to be tortured in the translation until it was made to speak the language he wished. Again I ask, how is a controversy to be managed with men who use such means?

If any proof were wanting that his deduction from these passages is unwarranted, it would be found in the quotation he makes from Brown's Civil Law. "By shore, the Institutes mean *up to* the high-water mark or &c. *as high* as the *highest* water wave washes." How is it possible for the man who cites this authority and relies on it, to conclude that the shore lies *above* high-water mark.*

As a proof that the practice is different, the declaration of Mr. Charles Laveau Trudeau is quoted, that "the grants of lands on the Mississippi have their fronts on the *edge of the river itself*, and when its waters are at their greatest height." Other parts of the same deposition, however, are *candidly* suppressed, in which he says "the batture he always considered as an alluvion, and although it did not form any part of the depth, yet he always considered it as much the property of the proprietor as the rest." No declaration, however, would suffice to shew that the practice of the country had been in conformity with Mr. Jefferson's principles, except it established the occupation of the alluvial lands in the crown; of which, if Mr. Jefferson can find a *single instance for one acre* in the whole province, I bind myself to release every future claim.—Yet he roundly asserts that the law, such as he lays it down on this point, *has been constantly practised on in the territory*.—The ridiculous consequence from this establishment of the bank of the river at the height its waters attained in an inundation was however so obvious, a river without banks was so extraordinary a phenomenon, that he is forced to say something on this subject; and what is it he does say? Why, he very ably, but not very

* Although I do not think the poets the very best authority in a juridical controversy, nor am I disposed to imitate Mr. Jefferson, when he quotes lines out of *St. Evremont*, to prove the legal signification of a French term; yet *Virgil* has, in one line, so distinctly marked the difference between the *bed* of the river, and the *fields* which it inundates, that I cannot resist the temptation of quoting them:

——— Aut pingui flumine Nilus
Cùm refluit *campis*, et jam se condidit *alveo*.—Æneid, L. 9, v. 31.

truly insinuates that we have "*exaggerated the strong* features of the Mississippi, have distinguished it from the other rivers of our country, and considered it as *sui generis*, not subject to the laws which govern other rivers, but needing a system of law for itself, until which system be prepared, it may be abandoned (he most pathetically adds) to speculations of death and destruction like the present." It is unfortunate for our eloquent author that this fine flourish has nothing to support it; the Corinthian capital has neither shaft nor base. We have never founded any argument on the distinction between the Mississippi and other rivers—we have never said that it wanted a system of its own, or required time to prepare that system of laws.—On the contrary we have always appealed to the laws established in *pari materia*, and have said that the proprietors of lands on the banks of the Mississippi have precisely the same rights with those of landholders bordering on other rivers, while Mr. Jefferson is himself the author or rather the copyist of those arguments which strive to establish a distinction—which class this river among non-descripts in geology, and characterise it as one which from the earliest ages existed without banks, until they were provided for it by the industry of man.—As however in this page (50) or rather in a part of it he seems to think it for the good of the nation *to assimilate all its parts, and to deal out law and justice to all by the same rule and the same measure*, I gladly avail myself of those favourable dispositions, and before we proceed to the next page, where we find them forgotten or abandoned, I close with the proposition, and claim the right of applying to the low lands of the Mississippi the principles which secure their property to the owners of the bottoms on the Shenandoah, the Potomac and James river, although those rivers once and perhaps oftener in a year cover them with their waters. —According to Mr. J., (p. 45), this annual swell is "*an annual* TIDE," and he says, *in the state in which he is*, that *tide* begins the first of November, rises until February, and then ebbs until April, when it is low water.—If it can be proved to me without the help of poetical quotations,* and without either *proskusis*

* For instance, Mr. Jefferson, who is so fond of quoting *St. Evremont*, might, perhaps, refer me to his correspondent *Waller*, who, when he wanted a rhyme for "*the river's verdant side*," did not scruple to call the stream *a tide*. But I am not prepared to yield to such authorities.

or *proschosis*, that the inundation of a river, either regular or irregular, annual or semi-annual, above the flux of the sea, was ever before called a *tide*, I will give up all pretensions as well to the property, as to any knowledge of the language in which we write; and Mr. Jefferson himself in the very sentence preceding this, evinces the improper use he makes of the term, for he says, "above the flow of *tide* it is covered half the year instead of half of every day, the *tide* there being annual only, or only one regular *tide* in a year." Which being rendered into English amounts to this: Above the *tide*, that is where the tide never comes, there is a *tide* for half the year.—Where such liberties are taken with the language, it is easy to write volumes, but difficult either to be understood or to convince. It is not, however, the interest of our author to speak English; if he called the overflowing of the Mississippi by its proper name, an annual inundation, there would be no room for all the fine-spun arguments he has used; a river inundates its banks, it overflows the fields in its vicinity, but it never yet was said to inundate or overflow its bed. Again I repeat, let Mr. Jefferson or his admirers shew me an instance, in which any man who understood the language has ever before this called the annual or the occasional inundation of a river above the flux of the sea a *tide*, or the lands occasionally covered by them a *beach*, and I give up the controversy. Until this is done let them and him confess, that this is an inadmissible perversion of language, and an attempt to impose upon his readers, which betrays the contempt he has for their understandings.

But the Mississippi had no banks from Bâton Rouge to the sea, until they were raised by the French settlers; nature had left this king of floods unprovided with them, until they were supplied by art. The first settlers lived in the *bed* of the river until they were numerous enough to raise levées. The grants of land were all void, for our learned author himself tells us, page 53, that though the bed of the river belongs to the king, "it *cannot become the subject of alienation*," and has shewn much patience in transcribing authorities to prove that he holds it for public use. Instead then of conveying so much land on the *banks* of the river, each of the early grants should have described so many acres in its *bottom*. And if the observation, p. 12—that if I had not been driven from my property I should

have been some feet under water; if this Attic observation were intended for argument, it is one that would apply to all the first settlers in the country before they had made their embankment.

The conclusion is as irresistible as the reasoning is luminous—"Wherever, therefore, the banks of the Mississippi have no high water-line, the objection is of no consequence, because the lands there are not yet reclaimed or inhabited; and wherever they are reclaimed, it is not true: for there a high water-line exists, to separate the private from public right."* This is verbatim our author's language;—the language of a lawyer, debating a question of title before an enlightened public, whom he thinks he can impose on by this wretched sophistry. The objection urged was, that if all was bed of the river, under what he calls high water-mark, then the whole country was bed of the river, because the river overflowed the whole; and to this he answers, your objection is of no consequence, where the artificial bank has not been made, because the lands are not *reclaimed* or *inhabited*. But the question is not, whether I inhabit or cultivate any land, but whether I own it—not what use I mean to make or can make of it, but whether it be mine or yours. You seize my property, saying it belongs to you; and when I complain of the act, you undertake to prove it yours, and think you have done so by asserting, that I do not "yet *reclaim* or *inhabit* it." Excellent logic! profound reasoning! In order, however, to have proved the objection to have been of *no consequence*, it would have been well to have shewn, not only that the lands on the Mississippi, where there are no embankments, are neither *reclaimed* nor *inhabited*, but that they were not susceptible of ownership; for I humbly apprehend it is of *some consequence* to me to shew, that I may *own*, though I have not improved, a parcel of land, which by industry I may render useful hereafter. The second part of his conclusion, that where the lands are reclaimed the objection is not true, I have already answered; and he himself seems not to think it very firmly established: for he tells us, it requires further development; and this is given to us in a note of two pages, closely printed, of which the object seems to be, to establish an analogy between the Mississippi and the Nile, with respect to their inundations.† Of all his labours, this is the one in which he has succeeded best; and it is the one most fatal to his argument. "The laws of the Tiber and the Nile, he says, are transferred to the Mississippi with perfect

* Jeff. p. 51. † Ibid. *in note.*

accordance." Here then we agree perfectly; and if we do not dispute about the laws of the Tiber and the Nile, our question is settled. Fortunately, I find all I wish to rely on adopted by my adversary, in the quotation from the Digest, which he was obliged to notice in our former publications.—

"Ripa autem ita rectè definietur id quod flumen continet naturalem rigorem cursus sui tenens; cæterùm, si quando vel imbribus, vel mari, vel quâ aliâ ratione ad tempus excrevit, ripas suas non mutat. Nemo denique dixit Nilum, qui incremento suo Ægyptum operit, ripas suas mutare vel ampliare, nam cum ad perpetuam sui mensuram redierit, ripæ alvei ejus muniendæ sunt."—"The bank may properly be thus defined: that which contains the river when flowing in its natural state.* But it does not change its banks when it is at times swelled, either by rain, by the sea, or from any other cause; for, no one *hath ever yet said, that the Nile, which covers* Egypt by its increase, has thereby changed or extended its banks; but when it has retired to its usual height, the banks of its channel may be secured."—Dig. 43. 12. 5.

Agreeing then both on our facts and our law, can we differ on the interpretation of it? It seems too plain to be misunderstood.—

"The bank is that which contains the water in its natural state." This seems pretty intelligible; but the law-giver knew the natural propensity of the human mind towards subtle refinements. Those who could dispute whether water was in its *natural state* when solid in winter, or fluid in summer, might well raise a question, whether the summer or the winter state of the river was the natural one. Therefore he adds, "but it does not change its banks when it is at times swelled† by rains, by the

* Literally, "*holding the natural rigor of its course.*"—
I do not adopt Mr. J's. translation of the word *rigorem.* From the context, it cannot mean "*direction.*" The legislator is drawing a distinction between the river when swelled by rain, &c. and when in its natural state; the *direction* therefore of the water, could have nothing to do with the subject.

† Mr. J. translates the word excrevit, "*overflowed;*" it signifies, as applied to water, *swelled, risen.* Excrescere et decrescere aqua dicitur, water is said to *rise* and *fall;* (Calvin's Dic. Jur.) and the Spanish passage from the *Curia Philipica,* which has been so much commented upon, even in Mr. Jefferson's incorrect translation, establishes a clear distinction between the *swelling* of the waters,

sea, or from *any other cause.*" Here then the quibble is foreseen and detected. The *natural state* of a river is defined to be, that in which it is when neither swelled by the sea, by the rain, *or by any other cause;* and that which contains the river in this state, is declared to be its bank. Apply this to the lands in question. They are acknowledged to be uncovered during the six months, in which the river is not swelled by the rains and melted snows of the upper country. They contain the river during that period; they are therefore on its *bank.* Can any thing be clearer than this conclusion from facts on which we agree, and from law which we do not dispute, and which my adversary himself says must decide the controversy?

After precept, our text affords us the illustration of example; and an example, which we both again agree to be analogous to our case. "No one (says the law-giver) ever said that the Nile changed its banks when it overflowed." The Roman governors of Egypt, though they sometimes vexed the alluvial proprietors with taxes, had not made the ingenious discovery, that all the land covered by the inundation was the bed of the river. This, down to the day of Justinian, had *never been said;* and the same thing might be repeated until a legist arose, whose researches have put a stop to the "*Nemo denique dixit*" of future jurists; and has discovered, in contradiction to a text he acknowledges to be law, *that* to be the *bed* of the river, and not its *bank*, "which is covered only when the river is at times swelled by rain, or some other cause"

Before we quit Egypt,* I will state a difficulty into which my

and the *overflowing* of a river, when it defines the bank to be, "the whole of what contains its waters, or of what its waters cover *when most swelled, without leaving its bed or channel.*" (Jeff p. 48.) The words "*leaving its bed and channel,*" clearly mean nothing else here, than *inundation,* or *overflowing* of the river; and the context evidently shews, that a river may be not only *swelled,* but *most swelled,* without *overflowing* or transgressing its natural bounds. But Mr. J. either lost sight himself, or wished his readers to lose sight of so plain and obvious a distinction. I will not undertake to decide between these two alternatives.

* In a sarcasm, of which I cannot feel the point, nor discover the wit, it is said, that I could not forget the flesh-pots of Egypt on my arrival in this country, which is facetiously called the land of Canaan. I know as little of its flesh-pots, as the late president seems to do of its laws. But I think, that when searching the Scriptures for unmeaning allusions, he might have discovered

adversary has drawn himself; and if he escapes from it, I abandon my cause.

We have seen that he acknowledges, and indeed labours to establish, the analogy between the Mississippi and the Nile; and declares, that the *laws* of the one, are transferred to the other with *perfect accordance*.* If this be the case, and I can shew that the alluvions of this very river, this Nile, so perfectly analogous in physical features with the Mississippi, so perfectly subject to the same laws,—if I can shew that the alluvions formed by this river, belong to the adjacent proprietor, I then prove, by the confession of my adversary himself, that the alluvions of the Mississippi also, belong to the owner of the bank. Because, in both cases we have the *artificial* bank; in both cases the alluvial land must be formed between this bank and the river; and until reclaimed, must be annually inundated by the river, and form that *margin*, that *band*, which he tells us is essentially its bed.

Let us try whether this law can be found.—

Of three laws on the subject of alluvions, contained in the 41st title of the 7th book, in the Code, two relate to the alluvions of the Nile. The first directs, that those who are enriched by the inundation of that river, (meaning, as Gottfried tells us in his note on the passage, by *alluvion*) shall pay an increased tribute; and that those whose lands are washed away, shall have a deduction made from their taxes.

The second is more explicit. "By this law, which we ordain to be perpetual, we order, that whatever is acquired to the proprietor by alluvion, (either in EGYPT by the NILE, or in the other provinces by other rivers) shall neither be sold by the treasury, nor demanded by any, nor separately estimated."

Now, if the laws of the Nile are "applied to the Mississippi, with such *perfect accordance*" as he says and I agree to, what question is left between us? After having thus completely defeated his arguments, to shew that the *shore* or the *beach*, as he himself repeatedly calls it, is not the bed of the river, it would be nugatory to examine those, by which he endeavours to esta-

some precept to arrest him in the unholy career of first oppressing a fellow citizen, whom he was bound to protect, and then adding mockery to his other outrages.

* Page 52, *in note*.

blish the property of the nation in the soil of that bed. The truth is, he expresses himself so indistinctly on this subject, that it is really difficult to discover his precise idea. The bed of the river, he says, "*belongs purely and simply*" to the sovereign, as the trustee for the nation; but then he acknowledges, "that it can not be his personal property, nor an object of revenue, but must be kept open for the free use of all the individuals of the nation." The latter part of this position is correct; but it is difficult to reconcile it with the first. If it belongs *purely* and *simply* to the sovereign, the individuals of the nation cannot have a right to use it; those terms exclude the idea of all participation of right.

The truth is, that, as we have seen in that branch of our argument, the bed of the river is private property when the river abandons it; but the public have a right to a free use of it while the river continues its course. The sovereign has no *property* in it; he is only bound, as conservator of the rights of his subjects, to see that no one usurps more of this common use than he is entitled to; or disturbs any other in the use of it; or renders it less fit for public purpose. He exercises the same right over a river that he does over a highway; of which it is allowed the soil may be private property.

The same thing may be said of the *banks* of navigable rivers, of which the use, for certain purposes, is in the public; and the proprietor cannot legally make any improvements on them which interfere with this use. The seven Latin pages which follow the 53d, contain this doctrine; it has been uniformly admitted on our side of the question; and most of the authorities cited, will be found in our publications. Why this display of false research is made, I know not; perhaps to induce a belief, that I contended for some right inconsistent with the use of the public; perhaps only to ornament the work, by a display of erudition; certainly not, however, from any necessity in the case; for the whole doctrine has, from the beginning, been unequivocally admitted. (Vide Report, *Gravier* v. *Corporation of N. Orleans*, p. 43. Examination, p. 41. Note F to the same, &c.)

I admit then, and have always admitted, that, as riparian proprietor, I could not legally project any work into the river that should injure its navigation, or erect any on its banks that should interfere with the use of the public; and I admit also, that on the 15th of February, 1808, twenty days after the presi-

dent had violently seized my property, the territorial legislature passed a law, making it necessary to obtain the assent of a jury, before any levée should be made or finished. But I deny the truth of Mr. Jefferson's assertion, that prior to the passage of this law, the assent of either magistrate or jury was necessary, to enable any proprietor to advance his levée as he thought fit. NOT A SINGLE INSTANCE, from the first settlement of the country, to the 15th of February, 1808, can be produced, of any such license being either asked or given; and, as far as I can learn, but one since that period; although thousands of acres have been enclosed in the first period, and hundreds in the latter.

The Roman law, it is true, required that security should be given, that an intended work in the river, should not injure either public or private rights. But whatever the practice were in Rome, we have seen that in Louisiana no previous leave was asked; and I apprehend that the banks of the Tiber and the Nile, as well as those of the Mississippi, might be enclosed without any such permission, where no opposition was made. If the neighbours dreaded any injury, they might apply, under the law Mr. Jefferson has cited, for an injunction, and the proprietor could not then proceed without giving security. But we have express law, that if he *did* proceed, and no person applied under the interdict, it was too late, after he had finished his work, to complain. The very next section to those he has quoted, Dig. 43. 15. § 5, makes this provision:—"Etenim curandum fuit, ut eis *antè opus factum caveretur*, nam *post*, *opus factum*, persequendi hoc interdicto *nulla facultas superest*, *etiamsi quid damni postea datum fuerit:* sed lege Aquiliâ experiendum est."—"Moreover it was provided, that this remedy should be pursued prior to the finishing the work; because, after it is perfected, no remedy is given by suit under this interdict, although an injury should be suffered by it, but the party is left to his action under the Aquilian* law."

With what justice, then, is it made a ground of complaint against me, that I did not do that, which no other individual, since the first settlement of the country, had done, or was expect-

* The Aquilian law is the 2d title of the 9th book of the Digest, and gave a remedy for direct injuries to slaves, cattle, or other property.

ed to do? Why should I alone ask for a license from the governor and the city council, which he is pleased to call the *proprætorian license*, when it was neither demanded by law, nor the usages of the country? Why should I give security, when nobody required it? Or how was I to "*carry my case before twelve brother riparians*," when I had been dispossessed twenty days prior to the passage of the law, which alone authorised me to do it. Yes, this vigilant guardian of the people's right, this upright magistrate, justifies himself for having given an order to dispossess me on the 30th of November, 1807, by saying, that I did not pursue a measure, which was only required and pointed out by a law passed in February, 1808.

Familiarized as I become, in the perusal of Mr. J.'s work, to extraordinary assertions, and to arguments arrayed against each other, I confess that I was not prepared for those which awaited me at the 63d page. "It must be noted, (we are told) that Mr. Livingston's works *were arrested* by the marshal and posse comitatus, by an order from the secretary of state, on the 25th of January, 1808; and that on the 15th of the ensuing month, the legislature took the business into the hands of their own government, by passing this act. From this moment, it was in *Mr. Livingston's power to resume his works*, by obtaining permission from the legal authority. The suspension of his works, therefore, by the general government, was only during these twenty-one days." I am at a loss here which to admire most, the hardihood with which the writer makes this unfounded assertion, or the inconsistency with which, in one line, he abandons all the former arguments of his book.

To give some colour to his assertion, that after the passage of the territorial law, I might have resumed my works by obtaining the permission required by that law, he has recourse to an equivocal expression, and says that they were *arrested* by the marshal, giving the idea, that I had simply been prevented from proceeding to erect a nuisance; when the truth is, that he not only arrested my works, but drove me from the property, took possession of it, and solemnly declared, that he took such possession, because the lands *belonged* to the United States. How, in the face of this declaration, this record, this official act,—how can he tell the world that I might have *resumed my works*, on obtaining the permission of a jury, according to this

law? Could the jury, or the *prætorian or propræturian* license, authorise me to deprive the marshal of the possession he had taken? Could the territorial legislature ever take the business into their own hands, while the claim of the United States subsisted? Had he not under his eye, at the time he wrote this extraordinary sentence, the law which declares, that the territorial legislature "shall have no power over the primary disposition of the soil; nor to interfere with the *claims of land* within the said territory?"* had he not himself sanctioned this law?

Could he have forgotten, that in his message to congress respecting this property, he tells them, that he "had taken measures to prevent any change in the state of things, and to keep the GROUND CLEAR OF INTRUDERS;" and desires them (the congress) to take measures for *settling the title?* He had driven me off as an INTRUDER on the 25th of January; he calls me so in the title of his book; he tells congress on the 7th of March, that he would "keep the ground clear of INTRUDERS;" and yet he very gravely tells me, and tells the world, that after the 15th of February, I might have "*resumed my works*," if a jury of twelve riparians had given their assent. Could the jury, I again ask, authorise me to commit, what he calls an *intrusion* on the lands of the United States? Could they counteract the measures he had taken to keep me *out of possession?* Nay, further, he tells this to ME, to whose respectful prayer to be reinstated in possession, he had replied on the 20th of May, that "the case of the batture being now referred to *Congress*, on the official opinion of the attorney general, that the RIGHT IS IN THE UNITED STATES, it is the DUTY of the president to *keep the ground clear of any adversary possession*, until they shall have decided on it."†

It was his duty to keep the ground clear of my possession, until congress should decide. Congress have not decided to this day; and yet, "the suspension of my works, by the general government, was only during these *twenty-one days!!*" If the assent of the jury was the only obstacle, why was I not referred to *them*, and not to *Congress*, when I petitioned to be put in possession? This is not all: not content, in the face of these declarations, to assert as a fact, that I might have resumed my works, in the page I have quoted, he refers again, page 76,

* Act of the 26 March 1804, sect. 4. Laws U. S. vol. vii. p. 114.

† Mr. Madison's letter, 20th of May, 1808.—*Livingston's Corresp.* p. 4.

to this law; and again repeats, " that it gave me an easy mode of applying for permission to resume my enterprise; and that had I obtained a regular permission, certainly it would have been respected by the national executive;"—that is to say, the national executive would have given a property, which he believed to belong to the United States; a property, in the state of which he had pledged himself to suffer " *no change;*" a property he had solemnly engaged to keep " clear of *intrusion and adverse possession;*" he would have given this up to the intruder, if that intruder had procured the assent of twelve men, all intruders like himself; because they are all possessors of the " *bank*," which he has proved, to his own satisfaction, to be public property. Would he have done this? If he would, he deserves impeachment for his disregard of what he says is the right of the United States; if he would not, he deserves something worse for the unfounded assertion.

Whatever may be the truth of this allegation, as to my being permitted to take possession of and improve the property, it is, as I have stated, totally inconsistent with all the acts of the executive, with all the former arguments he has used to support them; and is a most formal and unequivocal abandonment of the title in the United States, on which the whole proceedings were founded. In order to place this in a true point of view, it may be necessary again to call the reader's attention to the commencement of this controversy, and the pretensions which were advanced by the president of the United States.

After John Gravier had, as we have seen, been quieted in his possession of the premises in question, after the claim of the corporation either to the land or to a servitude in it had been rejected by the final judgment of the superior court, the counsel for the corporation set up a title in the United States, and moved on that ground for a new trial; this being rejected, the corporation stated a case to their counsel, Mr. Derbigny, and abandoning all title for themselves ask whether " the United States have not a well founded and clear title to the property, as being part of the public demesne?" On this case Mr Derbigny gives a very ingenious opinion, which concludes thus: " The undersigned counsel concludes from the above discussion, that the United States are now the *real proprietors* of the *batture*, *accretion*, or *alluvion*, situate in front of the suburb St. Mary,

and that if they claim it, the courts of justice cannot but acknowledge and confirm their TITLE." This is dated the 21st of August 1807, at New Orleans. It was sent on to Washington, and was made the basis of the memorable mandate of the 30th of November in the same year.—This mandate could only have been issued under the idea that the lands in question were the *property* of the United States; and we accordingly find that the instrument itself begins with reciting the title of an act made to enable the president to remove intruders from the *lands of the United States*, and declaring that the mandate was issued under that act, and that the property in question was land "*ceded to them.*"

Thus, in what preceded the act, as well as in the instrument which authorised it, we find it based upon an assertion that the *soil* belonged to the United States, that it was part of their demesne, that they were not its *guardians*, but according to the expression of the counsel, its "*real proprietors.*" After the act was done, we find this and this alone alleged to justify it. On my application to the president to be reinstated, he tells me he cannot do it; because the attorney general has given an opinion "that the *right* is in the United States," and this attorney general, when earnestly *pressed* to let me know what facts or documents were submitted to him as the case on which he gave his opinion, says explicitly, that he recollected *no other papers* than Mr. Derbigny's statement and opinion, and a letter from governor Claiborne mentioning that Mr. Moreau and Mr. Gurley concurred in it, and refers me only to a *coincidence in opinion with Mr. Derbigny*, not to any want of the pretorian license, or of the assent of a riparian jury. Now I ask whether the allegation that I might have resumed my works, on complying with the laws of local police in the territory, is not a most explicit and unequivocal abandonment of the claim of property in the United States, so solemnly asserted, so unconstitutionally enforced? Surely the instance before us is a proof of that loss of judgment, which in a bad cause leads to self-conviction. Falsely imputed by the Latin adage to the act of God, it arises from that natural confusion which obscures the best understanding, when employed in the defence of error, or the obstinate justification of wrong.—The mind that in a righteous cause could dictate those high sentiments of patriotism and eternal justice which ushered in our

political existence, and announced it to the admiring nations of the earth;—that very mind tempted into an act of oppression, is debased by a desire to defend it, and in the execution is inconsistent, weak, and worse than all, persecuting and unjust.

IV. This leads to the fourth head of defence* which supposes the property mine, but alleges an use of it inconsistent with the laws of the territory. The documents to which I have before referred shew how ill-founded is this charge. But suppose it true, what justification does it form for Mr. Jefferson's interference?

He has shewn that if I were guilty of these attempts to drown and poison the city, there were laws not only to punish but restrain me. The ancient and modern provisions he has cited authorise the judge on the complaint of any individual interested, to issue his injunction against the erection of the work.

He has not only cited the law, but shewn that proceedings were had under it; he has told the public, that my works were presented by a grand jury as a nuisance.—Why was not that presentment followed up and tried? I could then before a jury of my country have shewn the falsity of all these charges. If they were true, a verdict which could have been had in ten days, would have put a stop to my "aggressions" as effectually as the mandate of the president, and I believe every one will allow with rather a greater attention to the forms of law. That a president of the United States is required or even authorised to watch over the police of the rivers or the cities in the territories; that he is to abate the nuisances in the suburbs of New Orleans, and determine the proper height and extent of the levées in the Mississippi; that he is to guard against the accumulation of the "putrefying mass with which I was to raise up the foundation of my embankment," appears to me rather derogatory to his station and incompatible with his other duties; I had thought that they fell within the province of a high constable or a scavenger, that the first magistrate of our nation had certain duties assigned to him by the constitution, which he was to perform without interfering with the internal regulations of territories or states, and that when he was authorised to ask the opinion of the great officers of government, it was not intended that he should degrade them by deliberating on the propriety

* See above, p. 34.

of filling up a mud puddle, or pulling down a dyke in New Orleans.

Nec Deus intersit nisi dignus vindice nodus, Do not let Jupiter appear until his thunders are necessary, is a maxim, true as well in the common *prose* transactions of real life, as in the fictions of poetry. If my works were a nuisance, a court of quarter sessions with its sheriff, its constables and parish jury was a much more appropriate machinery, than the president of the United States assembling the council of the nation, drawing out its military force and lanching his thundering mandate at my unprotected head.

There is a real or affected ignorance of the first principles of our government, which runs through all this division of Mr. Jefferson's argument, that is degrading to the author in the first hypothesis, insulting to his readers in the second. The bed of the river and its shores belong, says his argument, to the public. The sovereign is the guardian of this public right, and though the soil of the bank may belong to an individual, it is the duty of the sovereign to take care that this right of private property yield to the public use. To this point he has cited Domat in p. 60. But in our government who is the sovereign? The executive head of the federation? or the local government, the state or territorial sovereignty? No man who understands the first rudiments of our constitution can hesitate on these questions; again, of the local government which branch? Every infraction of a public right is a public offence, and all these are to be punished by the intervention of the judiciary, a branch wholly distinct in our government from the executive, but which Mr. Jefferson has confounded with it in his principle, and has degraded by his practice.

The territorial government, for all the purposes of domestic rule, is as distinct from and as independent of the general government, as is that of the states. By the ordinance of 1787, which at the period of the transaction, formed the constitution of the territory of Orleans, there was a governor with executive power, a legislative council and house of representatives, with "authority to make laws in all cases for the good government of the district, not repugnant to the ordinance," or constitution, and a judiciary regularly organized. In short, a local government complete in all its parts, excluding as much any interference of the federal government, as those established in the

states. The care, then, of all these public rights in the territory of Orleans, belonged exclusively to the proper branch of the local government, and the interference of the president of the United States was as unconstitutional under that pretence, as it would have been in New York or Massachusetts; and he might as well order the marshal to call out his posse to destroy the weirs and floating nets in Hudson's river, or to cut down the wharves that project into its channel; he might as well, I repeat, order the demolition of Long Wharf, and direct the garrison of the castle to hold themselves in readiness for another Boston massacre, in case of resistance. He would be quite as justifiable in doing this as in doing what he has done, and he might use the same arguments with as much force in the one case as in the other.

That the right of interference resided in the territorial, not in the general government, is in effect acknowledged by our author himself, who tells us (p. 62) that "surely it is the *territorial legislature* which not only has the *power* but is under the *urgent duty* of providing regulations for the government of this river and its inhabitants," &c.—In the same page he tells us that "the governor and *cabildo* (municipal council) seem to have held this pretorian power in Louisiana, *as well as that of demolishing what was unlawfully erected*, and that the act of the legislature, without taking the power from the governor and city council, gives a concurrent power to the parish judge and jury," &c.—Here we have an express acknowledgment, nay more, a strong desire to establish a right in the *territorial legislature* to make laws on the subject in dispute, and in the territorial executive to carry them into execution—not only to prevent the erection of any nuisance, but to demolish it if erected.—If, then, this right both to legislate and execute was vested in the local government, what excuse has the president of the United States for his interference? In what part of the constitution does he find this concurrent right? What confused ideas, then, I repeat, must that man have of government who believes in this justification? What contemptuous ideas of the people to whom it is addressed must he entertain, who knowing its fallacy, thinks he can impose it on their understandings!

But supposing my works a nuisance, and the president of the United States to have the power to abate it, has he done so? Is

that the act of which I complain? neither the one nor the other;—his order is not an order to demolish my works, to fill up my canal, to pull down my house, but *to remove* ME *from the possession of the land*"—and this was accordingly done; the canal which was to poison the city by its pestilential vapours was suffered to remain, and is resorted to at this day, although nearly choked up for want of cleaning and repair, as a more commodious and safe harbour for boats than any other near the city. The levée that projected into the river and was to "sweep away the town and country in undistinguished ruin," was not demolished by this vigilant abater of nuisances: it was left to the operation of time to effect. The house which impeded the navigation of the river, and interfered with the public right to its banks, was transferred to the possession of the city of New Orleans, and for several years was occupied as their guard-house. So that if the facts alleged in Mr. Jefferson's justification be true, and it was his duty to abate the nuisance, he has totally neglected it; he has suffered the nuisance to remain, but has dispossessed the owner of the land on which it was erected,—a new mode of procedure, and somewhat inconsistent with that eager desire to destroy these dangerous works, with that active zeal which could brook no delay to consult the forms of law. The truth is, that this idea of the abatement of a nuisance is a complete after-thought, never alluded to in the act or in any of the early stages of justification, suggested now by a faint hope to elude fair inquiry, and made of such stuff as are the arguments of a Newgate solicitor in defence of a felon caught in the *manour*.—To hide the thread-bare weakness of this argument it is glossed over with a mock heroic declamation, in which pestilence and fever, death, destruction, ruin and inundation, frighten the reader in every line, and in which he has reproached me with being afraid of submitting my cause to a jury. Mr. Jefferson reproaches me with this!—He whose constant care has been by demurrers, by pleas to the jurisdiction, by every device that chicane could invent to avoid this species of investigation; he, whose steady phalanx of friends in congress defeated every attempt to submit the cause to any species of trial!—He utters this reproach to me! who for five years have been constantly engaged in the painful unavailing task of solicitation for this *or any other trial.* Such an insulting disregard to propriety and truth, forces me from the modera-

tion with which I wished, injured as I have been, to conduct the controversy; and the close of the passage now under review is calculated to inspire sentiments not only of indignation, but horror!

My life had been more than once threatened for exercising my legal rights. Emboldened by the idea of executive protection, excesses were committed in my case, which the love of order natural to the people of Louisiana had in every other instance avoided. The good sense of the people had got the better of this temporary frenzy; the necessity of submitting to the laws was perceived and acknowledged. Mr. Jefferson's friends must have informed him that these ideas began to prevail, and that if by a decree of the court, or in any other legal manner, I should recover my possession, there were now no hopes that I should be deprived of it by a mob. This was a prospect too mortifying to be endured, the people must be excited—the spirit of 1807 must be revived, and though the danger never existed, though if it existed it was long past, it must be painted in glowing colours, the vengeance of popular fury must be directed at my head; an expression in one of my letters, which it was thought would render me odious to the people, must be culled with malignant care—their conduct in opposing the laws must be spoken of with complacency, while mine in daring to complain is held up to the severest animadversions; and when by these arts a proper spirit is supposed to have been excited, they must be plainly told, that though their laws will not allow them to BURN me alive, it is a punishment mild enough for my offence!!

"What was to be done," says Mr. J., "with such an aggressor? Shall we answer in the words of the imperial edict?—*Let him be consumed* WITH FLAMES IN THAT SPOT *in which he violated the reverence of antiquity and the safety of the empire, let his accessaries and accomplices be cut off*," &c. "Our horror," he adds, "is not the less because our laws are more lenient." I ought perhaps only to laugh at the folly of this rhapsody, and remind the author that the flames were prepared by the Roman law for the *destroyers* of the dykes of the Nile, not for the one who erected them,—I ought to ask him good-naturedly to look at the title of his own law,* and determine which of us deserved

* De Nili aggeribus non *rumpendis*.

the stake. But I confess that the mirth naturally excited by the absurdity, is somewhat repressed by horror at the wickedness of this attempt.

On these facts and on this law, the late president says "*We* were called and repeatedly and urgently called to decide." As I do not suppose a republican magistrate could assume the ridiculous expression of royalty, by speaking in the plural number, I must suppose that he has fallen into it by reflecting on the various capacities in which he was thus *urgently called on* to act. As LEGISLATOR, he was to make a new law to fit the circumstances of the case; as JUDGE, he was to apply it to those facts which as a JUROR he was to ascertain, and to pronounce that sentence which, as EXECUTIVE OFFICER, he was himself to carry into effect; as PRESIDENT, he was to reclaim the lands of the United States; as COMMANDER IN CHIEF of the armies, a sufficient *military force* was to be prepared to over-awe opposition; as MAYOR of the city of New Orleans, he was to enforce its rights against the decrees of the court; as HIGH CONSTABLE, he was to abate nuisances, and as STREET COMMISSIONER to remove the *putrefying* mass, that threatened the health of the city. We ought not to be astonished that an officer who thought himself obliged to act in all these capacities, should speak as if he were more than one, nor that having in this instance invested himself with all the characteristics of despotism, he should have assumed its style.

Having established what he calls the fact, and the law of the case, he proceeds to shew, that he had applied the proper remedies. These he classes under three heads:

1. "The right to abate nuisances."

2. "The right to resume by force, property which had been unlawfully taken."

3. "The act of Congress, of the 3d of March, 1807."*

1. I have anticipated the argument on the first head, and have shewn that there was no nuisance; that if there were, a competent local authority was provided to abate it; that the president of the United States, if he acted on this ground, acted unconstitutionally, and assumed the powers of inferior officers, in a manner derogatory to his dignity, and contrary to his duty; and finally that if it were a nuisance, and it were his duty to abate it, he did not perform this duty, but left the nuisance *in*

* 8 Laws U. S. p. 317.

statu quo; and that the act complained of is not destroying the works, but depriving me of my possession.

2. The late president says, "every man has, by *natural law*, a right to retake by force his own property, taken from him by *force* or *fraud*." But as he acknowledges, that both by the civil and the common law, this right is restrained, I cannot see precisely the object of introducing it, any more than I can the dissertation on the right of recaption of personal chattels. The civil law and the common law, we agree, do not permit any individual to resume by force the possession of lands, although he may be the true owner. But this does not apply, it is said, to governments. Mr. Jefferson "believes, that *no nation* has ever yet restrained itself in the exercise of this right." He asserts the example of England as proof of this principle; but candidly allows, that he knows nothing of the Roman laws on the subject; which he sa s are, "immaterial, but *inasmuch* as they may be the law of the case in Louisiana." I am not sure that I understand this phrase. The late president's style is sometimes beyond my comprehension. I believe, however, he means to say, that the Roman law is material only, so far as it may be the rule to govern the case in Louisiana. Should this be what he means, I would ask, if it be the "*law of the case*" in Louisiana, is it not the only "*material*" rule? The case arose in Louisiana; and when I attempted to call Mr. Jefferson legally to account for his conduct in Virginia, he told me that I could sue only in Louisiana; that the rule which governs the case in Louisiana, must govern it every where, and be the only rule. The sentence I am considering, will amount then to this: *The Roman law is immaterial, but inasmuch as it is the only material rule.* Why this obscurity of expression? Why this confusion of ideas? Why all this from the pen of Jefferson? I have before hinted at the cause; it is no longer drawn in defence of truth; it is prostituted to the purposes of oppression!—it is employed in defence of error! The law of this country then, is the only object of enquiry. By becoming a territory of the United States, our laws were not changed; and by the terms of their compact with us, no man could be deprived of his property but "by the judgment of his peers, or the *law of the land*."* That law was unchanged by the transfer of

* Ordinance, 1787, transferred to the territory of Orleans, act 2d March, 1805.

the country, was expressly preserved by the law of the 2d of March, 1788, and still remained as it was under the dominion of Spain. The United States, in all cases not legally provided for by their own laws, were, as to their property, bound by those of the territory; for the recovery of their debts, they were obliged to pursue the forms used in the territorial courts. The mode of enforcing payment by execution, was in their case, as in that of individuals, restricted by the local regulations.

So with respect to lands: the United States had the dominion of all those which had not been legally granted. The territorial legislature could neither tax nor dispose of them; but all questions, relative either to their conveyance or possession, were subject to the decision of the laws relative to other real property. What were these laws on the point in question? Could either an individual or the government take by force, a possession of which either had been deprived, even by force or fraud? They could not. By the civil law, every entry by force was prohibited; and the deforcior forfeited, by his illegal violence, any title he might have had; and an action was provided, by which any one ousted by force, could recover his possession, even if he had no title and the disseisor had one. This part of the Roman code, made a part of the Spanish law, which governed, and still governs, the state of Louisiana; and its provisions, contrary to Mr. J.'s assertion, expressly extended to the government.

1. The action for the recovery of possession, forcibly taken, is called the interdict, *undè vi;* of which the description from the Roman law is,

Hoc interdictum proponitur ei, qui vi dejectus est: etenim fuit æquissimum, vi dejecto subvenire, propter quod ad recuperandam possessionem interdictum hoc proponitur.—Dig. 43. 16. 1. § 1.	This action is given to him who is expelled by force; for justice requires, that we should aid those who are thus ejected; wherefore, for the recovery of their possession, this action is given.
Ne quid autem per vim admittatur, etiam *legibus Juliis** pros-	That nothing should be permitted to be taken by force is provid-

* This expression shews, that the civil law, respecting forcible entries, is at least as old as Julius Cæsar. *Juliæ leges,* as we learn from the learned Godfrey, was the term employed to distinguish the laws enacted by the Comitia in the last years of the republic.— " Nam comitia, quæ erant præcipua reipub-

picitur publicorum et privatorum, nec non et constitutionibus principum.—ibid. § 2.

ed for, as well by the Julian laws. as by the imperial constitutions.

And see the whole of this title, *passim*, and the 8 Cod. 4. *undè vi*. These provisions are adopted and enforced by the laws of Spain.

Interdictum verò recuperandæ possessionis competit possessori per vim dejecto à sua possessione rei immobilis pro eâ recuperandâ, et vocatur *undè vi*. Textus est in lege 1. vers 1. Dig. *De vi et vi arm:* cujus verba sunt: *Hoc interdictum, &c.....*et natura, virtus et effectus hujus interdicti est, quod spoliatus restituatur in suam possessionem, et quod adversarius condemnetur in omni damno et interesse quod spoliatus prætenderit, etiam si excedat valorem ipsius rei."—Ant. Gom. in leges Tauri, p. 507.

The action for recovering "possession," lies for him who has been driven from the possession of his real estate, by force, for the recovery thereof; and it is called the *Interdictum undè vi*. The text is found in the Digest *De vi et vi arm. l.* 1. § 1 the words of which are, "*This interdict*" *&c.* &c. and the nature, force and effect of this action is, that the person ejected be restored to his possession; and that the defendant be condemned to pay all the damages he hath suffered, although they should exceed the value of the property.

2. The plea of title, is no bar to the recovery under this action.

Item adde, quod agenti interdicto *undè vi* non obstat *exceptio dominii;* imò ante omnia spoliatus est restituendus: undè si reus conventus excipiat de dominio, et offerat se incontinenti probare, non est audiendus; sed probatâ violentiâ, statim debet fieri restitutio.—Ant. Gom. de leg. Tauri, p. 508.

And moreover the plea of title is no bar in the action *undè vi*. But the person ousted, is first of all to be restored to his possession: and although the defendant plead title, and offer instantly to prove it, he shall not be heard; but the force being proved, restitution must be immediately awarded.

licæ liberæ insignia, sub Julio habita sunt, à quo et à cæteris magistratibus leges variæ veteri ritu rogatæ sunt, et ab ejus nomine quædam *Juliæ* dictæ sunt." Godf. Hist. Jur. Chron. p. 5.—Some other law, of the same import, must have existed at a much earlier period; for it is difficult to conceive a state of society, in which this pretended *natural* right could exist. It was, *probably*, the laws of the twelve tables. Mr. J. is *positive* (p. 66.) they contained no such provision; he forgets that we have only a few fragments of those celebrated laws; but he is quite as well acquainted with the laws he has not read, as he appears to be with those which he has.

3. The person using force to recover his possession, forfeits his title, if any he had, to the property.

Si invasor sit dominus, amittat dominium illius rei, et applicetur expulso; si verò non sit dominus, tenetur ei reddere possessionem ablatam, et insuper æstimationem ejusdem rei.

Gom. in leg. Tauri, p. 513.

If the deforcior be the owner, he shall lose the ownership of the property, and it shall be vested in the person expelled; if he be not the owner, he shall be held to restore the possession he has taken, and moreover, the estimated value of the property.

Si algun entrare ó tomare por fuerza alguna cosa que otro tenga en su poder y en paz, si el forzador algun derecho ai havia, pierdalo; y si derecho ai no havia, entreguelo con otro tanto de lo suyo, y con la valia, à aquel à quien la fuerzò: mas si alguno entiende que ha derecho en alguna cosa, que otro tiene, en juro y en paz demandelo.

Rec. de Castilla L: 4 tit 13. l. 1.

If any one shall *enter* or take by force, any thing which another possesses in peace, if the despoiler had any right, let him lose it; if he had no right, let him deliver it, with other like property of his own, or the value thereof, to him whom he hath despoiled; but if any one supposeth he hath a right to what is possessed by law, and in peace, let him demand it by law.

4. By the Spanish laws the government, and all its officers, are as much restrained from using force as an individual.

Defendemos que ningun alcalde, ni juez, ni persona privada no sean osados de despojar de su posesion à persona alguna sin primeramente ser llamado, y oido y vencido por derecho, y si pareciere carta nuestra por donde mandaremos dar la posesion que uno tenga à otro, y tal carta fuera sin audiencia, que sea *obedescida y no cumplida; y si por las tales cartas o alvalaes algunos fueron despojados de sus bienes por un alcalde, que los otros alcaldes de

We forbid any alcalde or judge, or any other person, to be so daring as to despoil any one of his possession, without his being first CITED, and HEARD, and ADJUDGED according to law; and should any royal mandate from us be produced, by which we may command, that the possession held by one should be delivered to another, and such mandate should be granted WITHOUT HEARING THE PARTIES, let it be disobeyed* and not executed; and if by any such

*The original is as I have transcribed it, *obedescida*, which signifies *obeyed*. This would be so directly at variance with the context, as to make complete nonsense. I have therefore supposed there must be an error of the press, and that it ought to be *desobedescida*, "*disobeyed*," as I have translated it. The reader, however, may judge for himself. I point out what I suppose to be the mistake.

la ciudad, o de donde acaesciere, restituyan à la parte despojada hasta tercero dia, y pasado el tercero dia, que lo restituyan los oficiales del consejo. Recop. de Castilla l. 4. tit. 13. l. 2.

mandate any person should be deprived of his estate, by an alcalde, let the other alcaldes of the city where it shall happen, restore the party ousted, until the third day; after the third day, let him be restored by the officers of the council.

The same provision is repeated and enforced by the seventh law of the same title and book, and by the first, second, third and fourth laws of the eighteenth title; the first of which directs, that any patents or orders, which may be given contrary to *right* or to *law*, or to the custom of courts, shall not be complied with: although they contain a clause directing them to be obeyed, notwithstanding any custom, law or ordinance.

" Porque acaesce que por importunidad de algunos o en otra manera nos otargarémos y librarémos algunas cartas o alvalaes contr a derecho o contra ley o fuero usado: porende mandamos que las tales cartas o alvalaes no valan ni sean cumplidas aunque contengan que se cumplan no embargante qualquier fuero o ley o ordenamento o otras qualquier clausulas derogatorias."—" Whereas it may happen, that through importunity or otherwise, we might grant letters or mandates contrary to law, or to some established custom; we, therefore, order that all such letters or mandates BE NOT EXECUTED, although they should contain a clause of *nonobstante statuto vel lege*, or any other derogatory clause."

The 31st law, tit. 18, of the third Partidas, asserts the same principle; declares all mandates of the king, given against natural right, to be *void;* and gives as an instance, the taking the property of any one, unless he had forfeited it by conviction for some crime. If it were necessary to make the research, I believe similar provisions may be found in the constitutions of every power in modern Europe. In France, we have seen, in a former part of this discussion, that the king, when he thought proper to claim alluvions as the property of the nation, did not deem himself authorised at once to seize on them, and oust the possessors. He ordered surveys to be taken, researches to be made, and gave the claimants an opportunity of making that successful appeal to the laws, which secured their property against the pretensions of the crown. It is not true then, as Mr. Jefferson believes, that no nation has ever yet restrained itself in the exercise of this

natural right. They have not all had that horror of the "*cavils of litigation*," that seems to have possessed the president of the United States; and while the most absolute sovereigns in Europe are seen to submit their claims to the decision of the laws, the first magistrate of a free republic, has the honor of inventing the practice of taking by force, and of applying to this proceeding the pithy expression, of seizing, at "*short hand*,"* all that he chuses to call the property of the public.

But the example of England is cited; and if it were against me, what would be the consequence? Does Mr. J. think he can assume the powers, as easily as he does the style of the king? But it is not against me; the laws of England are as far from making the king both judge and party, as those of France and Spain.

It is acknowledged, that "there are cases of *particular circumstance*, when the sovereign must institute a previous inquest;" "but in *general cases*, as the present, he *enters at once* on what belongs to the nation." "This (it is confidently asserted) IS THE LAW OF ENGLAND." I undertake, on the contrary, to shew, most explicitly, that this is not the law of England—that it is the very reverse; that, in *general cases*, the king cannot enter without an office found, or a judgment on an information for intrusion; and that it is only in cases of *particular circumstance*, as Mr. Jefferson calls them, (when there is evidence tantamount to the inquest) that these proceedings are dispensed with.

I should be surprised to hear this position from any other lawyer in the United States; but the review of this work has taught me a difficult lesson; I now wonder at nothing I find there. Let me go on then calmly, with the dull work of refutation. The constitution of England, is the most unfortunate example to which he could have referred. Though, in theory, the king is supposed incapable of committing a private wrong, in practice he is not permitted to do it. A remedy is provided for every aggression of the subjects' right. The king cannot enter, without an inquest found, or a judgment on an information; or some other matter of *record*, by which a *primâ facie* title is apparent; and even after this, the claimant may either traverse the

* Mr. J. not being able to find in the phraseology of our own law, any expression sufficiently descriptive of his outrageous proceeding, has borrowed, it seems, this technical term from the Scotch lawyers, who apply it sometimes, to distress for rent, impounding of cattle *damage feasant*, and other remedies of a similar kind, authorized, but regulated by law, so as not to produce oppression or injustice in practice. "Poinding *at short hand* for house-mail," Kaims' Law Tracts, 159.

inquest, or have a *monstrans de droit*, on which he may controvert the title of the king; and should he shew a better in himself, he has a judgment of the court, which instantly and by the very act, puts the king out of possession. This is so much the A B C of the profession, that it would be a vain parade of research, were I to cite all the authorities that could be produced. A page or two of Blackstone will settle the question.—

3d Blacks. 257. 259.—"The methods of redressing such injuries as the crown may receive from the subject are, first, such common law actions, as are consistent with the royal prerogative," &c. &c.

Second, the inquisition or inquest of office, which is an inquiry made by the king's officers, his sheriff, coroner, or escheator, *virtute officii;* or by writ to them sent for that purpose; or by commissioners specially appointed, concerning any matter that entitles the king to the possession of lands or tenements, goods or chattels," &c.—"These inquests of office were devised by law, as an authentic means to give the king his right by solemn matter of record; without which, he, in general, can neither take nor part from any thing. For it is a part of the LIBERTIES OF ENGLAND, that the king may not *enter upon, or seize any man's possessions upon bare surmises*, WITHOUT THE INTERVENTION OF A JURY."

There are some exceptions to this rule; one is created by statute in the tyrannical reign of Henry the Eighth; which enacts, that the estate of a person attainted of high treason, shall be vested in the crown, without inquisition.

Another is derived from the operation of law, which gives the crown the same, but no greater rights on this subject than are enjoyed by a subject, if the possession in law is cast upon him; as where he takes, by descent, in remainder or reverter. Stamf. 54. 4 Co. 58. Sav. 7. 9 Co. 95. 6.—For in all cases where a common person is put to his action, there, even after an office found in his favour, the king is put to his *scire facias;* for an office entitles the king to an action only, and not to an entry; but where a common person may enter or seize, there an office, without a *scire facias* shall suffice for the king.—9 Co. 266. Stamf. 55. *a.*

The last case in which the finding of the inquest is dispensed with, is where the king's title already appears by record; in which case it is generally unnecessary.—Stamf. 56.

But even in the case of an inquest found, it is not conclusive. The government of England has thought it not derogatory to its dignity, in favour of the subject's right of property, further "to bind up its own hands in the manacles and cavils of litigation;" (for it is in these terms a republican president expresses himself to designate an appeal to the laws.) The subject contending with his sovereign, may still sturdily refuse to yield. The law has provided him with more than one resource. He may, in most cases, traverse the fact found by the inquest; and has, in all cases, either his *monstrans de droit*, or his *petition of right*. The first, when he does not deny the facts found; the last, where he relies on new matter in support of his title.

Third. The third mode pointed out by the law of England, for the redress of injuries to the crown, by taking possession of public lands, is that of information "for intrusion, for any trespass committed on the lands of the crown; as by *entering thereon without title*, holding over after a lease is determined, taking the profits, cutting down timber, or the like." 3 Bl. Com. 261.—In all these cases, the party claiming a title, has a full and fair opportunity of shewing it, of examining that of the crown, and submitting both to the decision of a jury. Is it not extraordinary then, that one so well versed in the laws of England as Mr. Jefferson, should publish so deliberate, so malicious a libel on its jurisprudence?—that he should cite the English government as one which disdained the forms of law, and seized, at *short hand*, whatever it chose to call its own? as one under which the subject was liable to be dispossessed, whenever a tyrannical or necessitous king should claim his property as part of the domain? and that he should assimilate the powers of the crown, to those which he has illegally exercised? The boldness of the attempt excites astonishment; but it was necessary to attempt it. The constitution of the country, in which this daring violation of private right was committed,* assured to the inhabitants, "the benefit of the trial by jury," "and of judicial proceedings according to the course of the common law;" and solemnly declared, that "no man should be deprived of his liberty or property, but by the judgment of his peers, or the law of the land." Similar provisions are found in the great charters, which secure the English subject against the encroachments of the crown. It was necessary, therefore, to persuade the

* Ordinance of 1788.

American citizen, that these sacred provisions were nugatory in England, before he could calmly see them violated in America.

The contrast, too, between a monarch whom he has designated as a tyrant, bound up by the *manacles of litigation*—unable to *seize his own at short hand*—forced to respect the possessions of his subjects—affording them every means of asserting their rights, and that of the magistrate of a free people—playing the TARTUFFE of liberty—adoring it in profession, but in practice violating its most sacred principles—seizing on the property of a citizen without inquest, or the intervention of a jury—denying him every species of trial, and insulting him with impunity, when he dared to appeal to the public—this contrast was too striking to be endured; and the only way of removing it was, to bring our ideas of the British government, on the level to which his practice had degraded our own.

It is not true, then, that either in England or the more energetic governments which lately existed in the rest of Europe, the crown was permitted to seize property which belonged to it, without the intervention of those forms prescribed by law to protect private possessions from violence. The Spanish law, which is cited as that which persuaded the president that this power was vested in the former government of Louisiana, certainly is not calculated to give this idea. It directs that if any building injurious to navigation be made in rivers, or on their banks, they must be destroyed. This, clearly, is no proof that the government had a right even to put down the nuisance without a trial, much less to seize property that they claimed as their own. But the example of the Spanish governor and *cabildo*, it is said, was a sufficient excuse. This is a curious justification. One of the first Spanish governors, soon after his arrival, led out eight or ten of the principal inhabitants of the country, and shot them with as little ceremony as Mr. Jefferson seized upon my property; but he, surely, is not to learn that the *cabildo* was the *city council*, although the governor presided in it; and if they, legally or illegally, issued orders to destroy buildings which had been erected on Gravier's land, under an allegation that they were nuisances, does this give the same right to the president of the United States? The city council of New Orleans can make by-laws and orders for regulating the streets of the city, the same power was exercised by the *cabildo;* does this give a right to the president of the United States to participate in these

local regulations? But again I repeat, the Spanish government never took posession of the batture at *short hand*, as of property belonging to itself; Mr. Jefferson, acting in the name of the United States, did. There was, therefore, no example to justify him, and I have, I trust, shewn that if there had, it would have been an unlawful one.

If, then, neither the limited monarchy of England, nor the more absolute ones of France and Spain permitted the sovereign to be his own judge; if the subjects of those powers held their possessions under the guarantee of the laws, and not at the will of the prince, can this power be lodged in the first magistrate of a free people? can that people hold their property by so precarious a tenure? If so, by whatever name the government may be called, it is not *free.* It is of the essence of such a government, to have the three great departments distinct; so monstrous a confusion of the legislative with the executive and judicial powers, must forever forfeit all title to the honourable appellation of a *free* republic. Is the constitution of our country liable to this reproach? Or are those who have administered it chargeable with that of having violated its principles? These are serious questions, and naturally come to be considered in examining what Mr. Jefferson calls his "*third and conclusive remedy.*" This is the law of congress entitled "*An act to prevent settlements being* "*made on lands ceded to the United States, until authorised by* "*law.*"* Whatever other remedies Mr. J. had, he must justify himself under this, for it is the only one he has pursued; he took away my property under this act, and if I can shew: 1st. That my case does not come within it; 2d. That its directions were not pursued; or 3dly, that it is an unconstitutional act, I take away from the president every ground of defence.

I. *This is not a case coming within either the letter or the spirit of the act.* The slightest recurrence to its provisions, must shew that its intent was only to enable the president to guard against the intrusion of a class of men known in the United States by the appellation of *squatters;* that its provisions contemplate uncultivated land, where, from the remoteness of the situation, a sufficient number of settlers might be assembled to resist the ordinary process of law; but that it could not have entered into the mind of a single man who concurred in passing

* 8 Laws U. S. p. 317.

this act, that it was to give the president the means of depriving an individual of a possession, which perha might be the only evidence of his title, in a populous city where the claims of the public could easily be ascertained by law, and if well founded could as easily be enforced. Examine the whole of the act with this view, and it will be found that its provisions and expressions strongly impress these general ideas.—*Settlements* and *taking possession* are forbidden, as are *surveys* and *designating boundaries* "*by marking trees*," or otherwise. The second section allows the actual settler to obtain permission to continue on the "tract or tracts of land," he may occupy, "not exceeding three hundred acres"—and it is from the "*lands aforesaid*" that is, from such *tract* or *tracts*, that the president is authorised to remove the settler.

All these expressions clearly indicate the species of property, the description of lands, which the legislature intended to affect by this law—and shew that its spirit is violated by applying it to city lots, of which the possession, after a long course of expensive litigation, had been assured to an individual by the decree of a competent court.

The property in question comes as little within the letter, as it does within the spirit of the law.

The first section, which is said (p. 69) to be "*my part of the act*", enacts "That if any person or persons shall, *after the* "*passing of this act*, take possession of, or make a settlement "on any *lands ceded or secured to the United States*, by any "treaty made with a foreign nation, or by a cession from any "state to the United States, which lands shall not have been "previously sold, ceded, or leased by the United States, or the "claim to which lands, by such person or persons, shall not "have been previously recognised and confirmed by the United "States: or if any person or persons shall cause such lands to "be thus occupied, taken possession of, or settled; or shall sur- "vey or attempt to survey, or cause to be surveyed, any such "lands; or designate any boundaries thereon, by marking trees, "or otherwise, until thereto duly authorised by law; such of- "fender or offenders, shall forfeit all his or their right, title, and "claim, if any he hath, or they have, of whatsoever nature or "kind the same shall or may be, to the lands aforesaid, which "he or they shall have taken possession of, or settled or caused "to be occupied, taken possession of, or settled, or which he or

"they shall have surveyed or *attempt* to survey, or *cause** to be "surveyed, or the boundaries thereof he or they shall have de- "signated, or *cause*† to be designated, by marking trees or other- "wise. And it shall moreover be lawful for the president of the "United States, to direct the marshal, or officer acting as mar- "shal, in the *manner hereinafter directed*, and also to take such "other measures, and to employ such military force as he may "judge necessary and proper to remove from *lands ceded* or "secured to the United States, by treaty, or cession as aforesaid, "any person or persons who shall hereafter take possession of "the same, or make, or attempt to make a settlement thereon, "until thereunto authorised by law. And every right, title, or "claim, forfeited under this act, shall be taken and deemed to "be vested in the United States, without any other or further "proceedings: *Provided*, that nothing herein contained shall be "construed to affect the right, title, or claim, of any person to "lands in the territories of Orleans and Louisiana, before the "board of commissioners established by the act, entitled "An "act for ascertaining and adjusting the titles and claims to land "within the territory of Orleans and the district of Louisiana," "shall have made their reports, and the decision of congress "been had thereon."

To bring the premises within the words of this section, they must be:

First, *lands ceded or secured to the United States.*

Secondly, *possession must be taken after the passage of the act* (3d March 1807). But:

1st, These lands were not *ceded or secured to the United States.* The treaty of the 30th of April, 1803, which cedes Louisiana to the United States, gives them the sovereignty of the country, and all public lots, buildings, squares and *vacant lands*,‡

* It is so printed in the statute book, *attempt—cause;* from the context, however, it seems it should be *attempted—caused.*

† Same remark as in the preceding note.

‡ See the case of *The Commonwealth* v. *M'Kissick et al.* 4 Dallas 292, where these terms "*vacant land*" are adjudged not to include property in a city.

Lands granted by the British government before the revolution and forfeited to Virginia, are not "vacant, waste, or unappropriated lands," and could not be located as such by a person having a right to locate lands under the general land law of that state. *Grace* v. *Trustees of the University,* Court of Appeals, Kentucky.

but by the third article expressly provides, that the inhabitants shall be protected in their property.—If this land, then, was an inherent part of that which had, long prior to the treaty, been granted to those under whom Gravier claimed, they were not included in the cession to the United States, and were excepted out of it by the third article. That it was, by the very law of its existence as alluvial property, an inherent part of the original grant, I think has been sufficiently shewn. It was then not "*ceded or secured to the United States*," but on the contrary reserved for, and secured to the proprietors of the original grant.

And 2dly, These were not lands of which the *possession was taken after the passage of the act.*

It has been shewn from the nature of the property, that a constructive possession was all that could have been had in it, until its increase rendered it an object for improvement. That from that period, evident and notorious acts of ownership were exercised; public sales of parts thereof made fourteen years before the passage of the law, and an actual occupation, a *pedis possessio*, taken of other parts more than three years before. These acts, also, were made known to Mr. J. not only by publications but by record. The judgment of the superior court, whatever may be its effect as to the title of the United States, ought certainly to have been, at least, presumptive evidence to the president, of the *facts* asserted in it; he ought in common decency, in common justice to the characters of the judges, to have supposed that they would not have asserted on their oaths of office, that as fact, which was not proven before them,—and to have had at least respect enough for men of his own choice, to have supposed them capable of knowing when a fact was proved or not.

That judgment rendered by men of abilities and integrity, rendered after two years most laborious hearing of the cause, on the spot where the facts were controverted, against the popular side of the question, in defiance of clamour and riot; that judgment *quieted* the plaintiff in *his enjoyment* of the property, but did not give him a *new possession*. It referred to that which he had always enjoyed, and made perpetual an injunction against disturbing him, which had been granted at the beginning of the suit, two years before the passage of the law.

But because I took possession by virtue of my purchase from Gravier, after the passage of the law, my possession is not to

be protected. He could not have dispossessed Gravier, because *his* possession was anterior, but he may dispossess me who purchased that possession, because mine was posterior to it. What monstrous doctrine! Am I eternally obliged to be repeating the *first* principles of law, to one of the *first* lawyers in the United States?

That the vendee has all the rights of the vendor; that the possession of the one, is continued to the other, so as to effect even a title by prescription, is now for the first time called in doubt. It is true in all laws and particularly well settled in the civil—"Quotiens autem dominium transfertur; ad eum, qui accipit, tale transfertur, quale fuit apud eum qui tradit." Dig. de adq. rer. Dom. l. 20. s. 1. The only question is, what possession had the person from whom I purchased? I say a complete one, a possession in fact, a possession in law, a possession shewn by record, and a just possession.

"*Justè* possidet qui auctore prætore possidet." Dig. de adquir. vel amitt. possess. l. 11. "He is a just possessor who is in by the authority of the judge."—Gravier was in by the authority of the judge, by virtue of the injunction issued in April 1806, more than a year before the passage of the law.

Gravier's possession was *my* possession, it was a *just* one and was long *anterior* to the passage of the law.

If this were not true, every purchaser of property in this country, since the 3d of March 1807, would be liable to be dispossessed by the words of this act, although the seller had been in possession from time immemorial. It is clear then, that the act contemplated a *new*, not a *continued* possession, although the possessor might be changed. Mr. Jefferson, (p. 69), affects to think that my counsel contend for what he calls a *remitter* of possession under the judgment, and says he will shew the judgment to be void, as being given by incompetent judges. In the first place neither my counsel nor myself, have contended for any thing like a *remitter*. We had said what I have just repeated, that my possession is a continuance of Gravier's, that the possession is entire, though the person of the possessor is changed, and we rely on the judgment only as evidence of the *fact* of possession, not as giving us any right against those who were no parties to it. Sensible of the weakness of his argument on

this point, Mr. Jefferson is reduced to a necessity which would deserve our pity, if the expedient he adopts to relieve it, did not excite feelings of a different description.

"If (says he) the judgment of the Court had been a remitter," that is, if my possession should be deemed a continuation of Gravier's, and of course not subsequent to the law, "then I should have observed that the order had been executed on a person not comprehended in it, for it was expressly restrained to possessions taken after the 3d of March, 1807. In that case the marshal must justify himself not under the order, but in virtue of his personal right to remove a nuisance." What?—The whole of this transaction, then, is a trap for the poor marshal: you have worded your order in such equivocal terms, that though he should do, what you acknowledge it was your intention he should do—your order should be no justification for him; acting under the mandate of the President, that mandate is not to be his warrant, but he is to justify himself for taking possession of the Batture, as of "*Lands ceded to the United States*," under *his* right to remove a nuisance which he never did remove, and which both you and he well knew was no nuisance.

In the whole of this transaction, then, we find a consciousness of wrong, a fear, from the very commencement, of legal investigation, and a studied contrivance to shield himself from the consequence of his illegal acts, at the expence of those by whose ministry they were carried into execution; and this suggestion by which Mr. J. endeavours to escape from the responsibility of the act, and throw it on an honest man who would have lost his office if he had refused to obey; this generous contrivance by which the marshal is left to escape as he can, behind the poor paper defence that is prepared for him,—all this is of a piece with the plea made in Virginia, that I ought not to sustain my action against the principal aggressor, because I had not brought in his instrument to share the penalty and ease him of its load.—"In that case the *marshal* must justify himself *not under the order*, but his *personal right* to remove a nuisance." Not so, sir; the principal aggressor is not so easily to escape; it is not the marshal who is to justify himself, but the President who directed him; the order is not to be withdrawn, in order to make room for the abatement of the nuisance; the mandate and its maker, must and shall stand before the public, at least, if I

cannot bring them before a Court, and this last poor effort of evasion and chicane shall be of no avail.

If Mr. Livingston's possession was anterior to the passage of the act, then the warrant ought not to have been executed on him; the marshal then has exceeded his authority and cannot use the mandate as his justification, because he was ordered to dispossess *those only who had taken possession after the 3d of March*, 1807. This is Mr. Jefferson's reasoning, but he does not tell us, that when he issued the warrant, he was as perfectly acquainted as he now is, with the date of my possession, and the circumstances under which it was taken. What then was his intention, that it should be executed *on me* or not? If he did not intend that it should be so executed, why was it issued? If he did, with what decency can he now attempt to throw the responsibility on his officer for doing that which he intended he should do.—The quibble therefore drawn from the words of the order will not serve him, for he has made the marshal's act his own, not only by previous intent but subsequent ratification. He has reported it to Congress, he has acknowledged and vainly attempted to justify it to the world, as his own, and ratification renders the principal liable as well for the *torts* as the contract of the agent.

"Dejicit et qui mandat." Dig. 50. 17. 152. He expels another by whose command it is done.

"Sed et si quod alius dejecit, ratum habuero, sunt qui putent (secundum Sabinum et Cassium, qui ratihabitionem mandato comparant) me videri dejecisse, interdictoque isto teneri: et hoc verum est, rectiùs enim dicitur, in maleficio ratihabitionem mandato comparari." D. 43. 16. 1. s. 14.

"But if I ratify the act of expulsion done by another, there are those who think (with Sabinus and Cassius, who place a ratification and an authority on the same footing), that I shall be deemed to have made the expulsion myself, and be bound by this interdict (*undè vi*); and this is true: for it may properly be said that in torts a ratification is equal to a command."

Whatever, then, were the terms of the mandate, it was intended to operate on my possession, (the date of which was known when it issued). It was executed according to the intent, and he who issued it, ratified the execution. Therefore if I have shewn my possession to be prior to the law, I shew an illegal act, and prove Mr. Jefferson himself, not the marshal, alone guilty

of it, and on this point, as well as the former, I may flatter myself with having proved, that neither my property nor my possession of it, came within the purview of the act of Congress. But if they had been embraced by it, the act of dispossession was not the less illegal, because:

II. *The directions of the act were not pursued.*

Soon after the United States had taken possession of Louisiana under the treaty, an act was passed, of which the object was to discover what tracts of land had been legally granted by the former sovereigns, and how much was still vacant. It directed that persons claiming lands, should exhibit their titles to boards of commissioners appointed for that purpose, by the first day of March, 1806, which, by a subsequent law, was extended to the first day of January, 1808.—This exhibition of title is made *obligatory* on the claimants under incomplete titles, *optional* with those proprietors whose grants were formal and complete. Act of the 2d of March, 1805. Sect. 4.

The claimants under complete grants having their title secured by the treaty, were, as we see, under no necessity of filing their claims. Those only who wanted a further confirmation from the new government, were obliged to do it.—That under which this land was held, being a *complete grant*, those who claimed under it, did not deem it necessary to incur the expence of laying their title before the commissioners, and this is a full answer to Mr. Jefferson's declamation, about my declining or passing by "the preparatory tribunal of the commissioners."* It was left at my option, whether I would submit my title to their inspection, or not, and we shall presently see that the time given me by law to make this election was not allowed.

There is another law of the United States, supplementary to the former respecting lands, which is approved on the same day with that under which the warrant was issued, but being two chapters before it in the statute book, was probably passed by the two houses some time before. This law extends still further the time for the exhibition of claims, to the 1st of July, 1808, declaring that "persons delivering such notices and evidences shall be entitled to the *same benefit*, as if the same had been delivered within the time limited by the former acts," and which gives (by the 4th section) to the commissioners the right of *finally* deciding all claims for a quantity not exceeding one league square of land, in favor of any one or his legal represen-

* Jeff. pp. 69. 70.

tative, who was an inhabitant of the province on the 20th of December, 1803.

The first section of the law under which the mandate issued, we have seen, contains a proviso that " nothing therein contained, shall be *construed* to *affect the right, title or claim* of any person to lands in this territory—until the commissioners shall have made their reports, and Congress shall have decided thereon." —Now as this proviso is contained in "*my part of the act*," I must be entitled to its benefit; and as the commissioners did not make their reports until the end of 1812, and Congress have not yet decided on them, I have a right to protest against any *construction* of the section, which *affects* my "right, title or claim," and most assuredly that construction affects them all, which supposes it to vest in the president the power of dispossessing me by force, without a hearing. Does it not *affect* my *right* to lands, to give another the legal power to deprive me of their enjoyment? The exercise of this power is a temporary destruction of my rights. Let us distinguish; the casual loss of possession does not, indeed, absolutely destroy my right to the land, but giving another the legal power to dispossess me, does *affect* it, because it creates a *right* in that other to expel me, which is inconsistent with my right to enjoy. There cannot be two inconsistent rights to the same thing. The right to enjoy is inherent to the right of property; whatever interferes with, a fortiori, whatever destroys it, must *affect* that right. Therefore a right given to another to expel me from my land, *affects* my right to the land, and as, by the very words of the proviso, the power to *affect my right* is limited to the happening of events which had not then, and have not yet taken place, it follows irresistibly, that having done an act which does *affect* my right, he has done that which was not warranted by the law, in other words he has not pursued its provisions.

Taking his usual liberty with the text of every law that stands in his way, Mr. Jefferson quotes the proviso thus, (page 69): " Providing however that this *removal* shall not affect his *claim*, until the commissioners shall have made their reports, and Congress decided thereon."—And he takes care to connect it with the enacting clause, by placing it between the *same inverted commas*, as being a continuation of *the same text*.—Never was there a more flagrant perversion. If the law had really declared, as this false quotation makes it declare, that the *removal*

should not affect the claim, &c., then it might have been understood to authorize the removal; but the proviso says nothing of the effect the *removal* is to have on the claim; its words are: "*Provided that nothing* HEREIN CONTAINED, *shall be construed to affect*," &c. What was *therein contained?* Not the *removal*,—that is not contained in the law,—*but* the *power to remove*, and the law, then, substituting this synonymous phrase, would read thus: *Provided that no power herein given to the president, shall be construed to affect the right, claim, or title &c. until the commissioners, &c.* If the intent of the proviso had been such as Mr. Jefferson supposes, the language he ascribes to it, would have been in truth adopted; if it had intended that the president might remove from the possession, and that the party might afterwards discuss his eventual right to recover it, before the commissioners, the expression *removal*, or some other equivalent one would have been employed; but even then we should be at a loss to account for the subsequent limitation, "*until* the commissioners shall have reported." The removal shall not affect the claim *until* the report is made and decided on. Shall it then? certainly not; according to Mr. J.'s construction, the removal is to keep every thing in *statu quo;* it cannot, according to his sense then, *affect the right* any more after, than it did before it took place, and the limitation therefore, as he reads the phrase, is nonsense. But as I construe it every thing is consistent; the president shall have the right of removal, but he shall not exercise it as to the lands in Orleans or Louisiana, *until* the commissioners shall have reported, and Congress shall have confirmed their report. Why this proviso in favor of these territories? Because commissioners were then occupied in determining what were the *lands ceded to the United States*, to what lands they had conferred the title; in short, in ascertaining by their reports the facts on which alone the President was empowered to act. My construction allows the President to act in something like a legal form; by adopting it and restraining his right of removal to the time when the reports of the commissioners shall have been confirmed, he will at least have some evidence of the facts and of the dates: that evidence will have been collected in something like a legal form, the party will have had an opportunity of producing his witnesses, and knowing those who have appeared against him, and a substitute of some sort, will have been provided for the inquest of office. But by

the interpretation given to the proviso by Mr. Jefferson, the President must proceed without any means of ascertaining the facts which alone render his measures legal, should he wish to proceed correctly; and what is worse, he *may* proceed, should he be guided by unworthy motives, he *may* proceed directly contrary to the intention of the law. As on this construction he is sole judge, both of the evidence used and of the means of obtaining it, he may listen only to his own suspicions or the secret denunciations of others, he may consult the private interest of his favorites or his own popularity, and masking the whole with the appearance of zeal for the public interest, he may chuse the innocent victims of the law among his enemies,* and suffer guilty aggressors, who have the merit of supporting him, to escape; he may do all this with impunity, because whenever called on to account for his conduct either before the public or his constitutional judges, he may say, as Mr. J. has said, if I erred, it was an error of judgment, the law made me the judge of the evidence and I thought it sufficient.—Should the plain language of the law be followed, no such excuse could be allowed, for the report of the commissioners would have ascertained the facts, and have left the President no occasion for the application of his judgment to the evidence.—Which of these constructions, then, is most probably the true one,—that which leaves every thing to the discretion of one man, which makes him judge of law, of fact, and executor of his own decisions, which permits him to take evidence in secret, and even allows him to act without it, which destroys all responsibility, and gives a ready excuse for every act of violence,—or that which confines the executive to executive duties, which ascertains facts by the open examination of witnesses, prevents every act of expulsion until the fact is ascertained to warrant it,—and affords no excuse for a wanton act of oppression. Surely in a government of departments, there can be no hesitation in deciding on this alternative.

Thus we find, that in the first section, which he emphatically terms "my part of the act," there are provisions that ought to

* —— Nunquam, si quid mihi credis, amavi
Hunc hominem.—Sed quo cecidit sub crimine? quisnam
Delator? quibus indiciis? quo teste probavit?
NIL HORUM: verbosa et grandis *epistola* venit
A Capreis.—Benè habet, nil plus interrogo. Juv. Sat. x.

have protected my property from this violence. But this is not the only proviso overlooked on this important occasion. By the first section, we have seen that the president was authorised to direct the marshal, *in the manner therein after directed*, to remove from lands ceded, &c. In order to determine whether the law has been pursued, we must inquire what is the manner of directing the marshal, that is *therein after directed.*—The second section contains no provision on this subject; it relates to persons residing on lands belonging to the United States; and directs a mode, by which, provided the party renounces all claim, he may obtain permission to remain on the land.—The third section provides for the registry of such permissions.—The fourth and last section, only, contains these directions; and in the first line, we find a provision which has been totally disregarded. "It shall be lawful, (says this section) AFTER *the first day of January next*," for the marshal, under such instructions as may for that purpose be given by the president of the United States, to remove from the lands aforesaid, any and every person who shall be found thereon, and who shall not have obtained permission to remain thereon as aforesaid.

There is, then, a provision, that three months' previous notice shall be given to those, who were settled on such lands prior to the passage of the act; and imposes a penalty on them for non-compliance with such notice. It then points out clearly, and explicitly, the nature of the evidence required, in these words: "and the certificate of the proper register or recorder, shall be a sufficient evidence, that the tract of land which was occupied by the offender, had not been previously sold, leased or ceded by the United States; that the claim to such tract had not been recognized and confirmed by the United States; and that the person occupying the same, and removed, or to be removed, had not obtained permission to remain thereon, in conformity with the provisions of his act." Then another proviso, that nothing in this section contained, (and note, that this is the only section, which directs the manner of authorising the marshal to remove) shall be construed to apply to any person claiming lands in the territories of Louisiana and Orleans, whose claim shall have been filed, with the proper commissioners, *before the first day of January next.*

Now, what can be said for the open contempt of every provi-

sion of this fourth section, to which the first refers the president for the manner in which he is to direct the removal?

Its operation is limited to some time after the 1st of January, 1808; yet on the 30th of November preceding, he signs the warrant. It is not to apply to any person in this territory, who shall have filed his claim before the 1st of January, 1808; yet, without waiting to see whether I would file such claim, the mandate is issued a month before that day. Should this last objection be answered by saying, that the event has shewn, that I did not file my claim before the 1st of January,—I reply, this does not excuse the illegality of the warrant; the law does not authorise him to command the marshal to remove such as he believes *will not* file their claims before the period assigned, but only such as *have not done it.* He was therefore, if he intended to observe the law, obliged to wait the expiration of that period. Should he attempt to obviate the first objection, by saying, that the limitation relates to the execution of the order by the marshal, not the giving it by the president, I answer, that this is at war with the spirit, and even the letter of the act; which clearly intended to fix the period at which the commissioners' power ceased, as the one at which that of the president should begin; for this plain reason, that inquiry should precede action; that facts should be stated before a conclusion could be formed; that sentence should go before execution.

And I further reply to both these answers, by remarking that, though the first day of January was designated by both the provisions I have pointed out, yet that period is fixed, only because it was the time limited for the commissioners to receive claims; and that this period was extended to the first day of July following, by an act passed the 3d of March, 1807; which expressly provides, that "persons delivering such notices and evidences, (before the 1st of July, 1808) shall be entitled to the *same benefit*, as if the same had been delivered within the time limited by the former acts," (before the 1st of January, 1808.) Now, I ask, whether exemption from removal was not a *benefit* I would have been entitled to, by delivering my claim before the 1st of January, 1808, by the former act? If so, it is secured to me by the act of 1807, provided I file the claim before the first day of July. Yet, without waiting to know whether I will file it, even before the 1st of January, the warrant is issued in November, by the president, and the marshal executes it in Ja-

nuary: in defiance of the law which explicitly gave me *until July* to perform the act, on the failure of which alone I could be dispossessed. In this, also, the directions of the act have been disregarded, even if mine were a case coming within it.

If, however, this act comprehends such a case as mine, and authorises such proceedings as have been had against me, it will cost no great trouble to shew,

III. *That it is unconstitutional.*

The government of the United States, is one of departments. With some exceptions, the three great branches are kept perfectly distinct. Those exceptions being clearly pointed out, prove the rule. The president participates in the duties of the legislative branch by his qualified *veto;* the senate, with those of the executive, in confirming appointments; and both the senate and house of representatives, with those of the judiciary, by their agency in preferring and trying impeachments. No duties, however, mingling with those of the other departments, have been prescribed by the constitution to the judiciary.

An act imposing the duties of one of these branches upon either of the others, is unconstitutional. One arming a single branch with the powers of the others, is tyrannical as well as unconstitutional. Whatever tends to this effect in its consequences, sins against the spirit of the constitution—whatever produces it directly, violates its letter.

To prescribe rules by which a question of property shall be determined, is a legislative act. To decide that question, is a judicial one; and to carry that judgment into effect, belongs to the executive power. In our constitution, congress enact the rules of evidence. One branch of the judiciary ascertains the fact, to which the other applies the law; and the president, by his ministers, executes the sentence. There is harmony as well as justice in this distribution. Whatever inverts it, is unconstitutional and tyrannical. To prescribe what acts are necessary to acquire or to preserve property, is an exertion of *legislative power*. Should it be exercised by the *judiciary*, as the same power that makes may alter, there would, in fact, be no rule; it would vary with every case. Law is nothing but the expression of legislative will. In cases where judges are legislators, we should have no law but the judges' *will;* consequently, no fixed law as a guide for judicial decisions. Such a state would be one of miserable servitude; and admit of no increase, but that which

would result from adding to the right of making and expounding laws, the power of executing them. There can be no civil liberty in the government where this confusion of power generally prevails; and the constitution of a country is less perfect, in proportion to the number of particular cases in which it is admitted. By our constitution, this intermixture of powers is sanctioned only in the instances already pointed out. Whatever act, therefore, multiplies these cases, is unconstitutional.

Let us test the law now under consideration, or rather Mr. Jefferson's practical construction of it, by these principles. It authorises him to remove persons, who have taken possession of lands belonging to the United States before a particular period. Whether certain lands belong to the United States, whether a certain individual has taken possession of them, and at what period, are *judicial questions*. The removal that takes place after their decision, is undoubtedly an executive act. But by Mr. Jefferson's construction of the law, and his practice under it, both these duties devolved upon himself, and produced an union of judicial and executive powers. But before a decision could be made on the question of property or possession, some rules of evidence must be formed, some law by which the decision is to be made;—what shall be the evidence of property—what of possession—shall it be written or oral, positive or presumptive—how this evidence is to be produced—shall it be taken in the presence of the person interested, or *ex parte* only—shall he have the privilege of producing proof—shall he be heard by counsel? The solution of these, and many other questions of the like nature, are so many laws which must be provided for the judge. If he be allowed to make them, he has then *legislative power*. But this is precisely what Mr. Jefferson has done, and what he thinks the law allows him to do. The law then, by his construction of it, gave him, as president, legislative, executive and judicial powers; and, of course, if there be any truth in the principles I have laid down, must be unconstitutional.

On the last division it may be answered, that, although the act gives no rules of evidence, it does not necessarily follow, that it delegates the power to make them; and that there are laws already in existence on this subject. To this I reply, that those rules relate to the common course of judicial proceeding in courts; and that when powers are given, totally inconsistent

with that course of proceeding, another set of rules must be provided. And of this opinion Mr. Jefferson seems to have been; for there is not a rule of judicial proceeding, that he has not discarded—not a principle of evidence, that he has not violated—not a maxim of justice, that he has not trodden under foot in the course of this investigation. His evidence was *ex parte*—taken in secret; and what evidence? *quo teste? quibus indiciis?* Deeds? Documents? depositions of witnesses?—Nothing of the kind: *nil horum*, as in the passage from Juvenal before quoted.* What, then?—Again in the language of the Roman satyrist, *verbosa et grandis epistola venit.* He had the *letters* of a man known to be at variance with me, and the argument of a counsellor, whose duty it was to invalidate my title, and who had been professionally employed for that purpose. This, I am well convinced, is all he had; for, whatever shreds of proof he may have patched together since,† I have the strongest presumptive testimony he had nothing better then. With this, and this alone he was satisfied. *Benè habet, nil plus interrogo.*

* P. 132.

† A few months after the transaction, I wrote to Mr. Rodney, to whose advice I was always referred for a justification of the proceeding. I wrote to him, to intreat that he would let me have a copy of his opinion, and give me the evidence on which he had founded it. I conclude one of my letters on this subject to him thus:

"I give you at foot a list of the documents I have seen, trusting, that if there are any others, which you have made the basis of your advice, you will communicate them." At foot was this note: "List of documents furnished to support the title of the United States, which I have seen.—1. Mr. Derbigny's statement and opinion. 2 Examen de la sentence. 3. Pièces probantes. 4. Resolution of the corporation of New Orleans, requesting the governor to take measures to assert the title of the United States. 5. A letter from governor Claiborne, stating, among other things, that *he believes* Mr. Derbigny's statement of facts to be correct. 6. Extracts from the Deliberations of the Cabildo." To this letter, in which I not only apply seriously to his recollection, but aid it, as far as lay in my power, by pointing out the papers I had since seen, the attorney-general replies: "My impression is, that the *statement of Mr. Derbigny, with his opinion*, and a *letter from governor Claiborne*, mentioning that Messrs. Gurley and Moreau Lislet concurred in that opinion, were the papers officially furnished me; *I do not recollect, at present, that there was any other!!*"—I ask, whether the attorney-general's *impression*, so shortly after receiving the communication of the *two papers;* his want of recollection of any other, when the rest were specially referred to, is not the strongest evidence, that *no other* proof was offered to him?

The party, so far from being called on to defend his title, had no notice nor the slightest suspicion of the nature of the proceedings against him. It is therefore evident, that the president thought himself bound by no pre-existent rules, either as to the mode of making the enquiry into the title or the fact of possession, or the nature of the evidence to support them; and that he had a right to adopt such as he thought proper, or in other words, to *legislate* on this branch of the subject. According to the practice under this law, and the exposition of it made to justify that practice, it authorizes a confusion in the exercise of powers, confided, by the constitution, to distinct hands, and of course is *unconstitutional.*

But I do not rely solely on the violation of the great principles of the constitution, apparent in this act: there are particular provisions with which the practice, under it, is equally at war.

By the third article, the "judicial power of the United States is vested in one supreme court, and in such inferior courts as the congress may from time to time ordain and establish."

By the first article this power of establishing courts, inferior to the supreme court, is expressly enumerated among those given to *the congress.*

By the second article the "president is empowered to require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject *relating to the duties of their respective offices.*"

If, under the clause last quoted, the president should *assemble* the heads of the executive departments, and, instead of asking each one his opinion in writing on a subject relative to the duties of his *separate* department, should put to *all* a question relative to the duties of *one* department, or a question which related to neither,—there is nothing in this contrary to the letter of the constitution, because the members of such a council are at liberty to give or refuse the opinion demanded of them; and when given, it forms no rule for the president's conduct: but though not contrary to the letter of the constitution, it will, I believe, be found contrary to its spirit, by which the president is supposed to take the responsibility of all his acts, divided with the particular officer whose advice he is empowered to ask on the business of that officer's department, but undivided

as to all those measures which the constitution and laws have placed under his sole direction.

It is true, as I have said, that the heads of departments are not obliged to assemble in what is called a cabinet council, and, when there, each member may refuse to give any opinion, except on the business of his own department. But the exercise of this right of refusal cannot be expected from men holding their offices at the will of the president. It is, therefore, nugatory in practice, and the request of the president is, in this respect, equivalent to a command, which must be obeyed. The convocation of the heads of departments is in effect the creation of a privy council, which is a body unknown to the constitution.—As, however, (it may be said) the president is under no obligation to adopt the decisions of this council, it is an harmless and may be an useful body. It is no more than the convocation of a few enlightened friends, to aid the first magistrate by their advice, which he may adopt or not. This is true in theory, but in practice there is nothing more unfounded.—There is certainly nothing to reprehend in the practice of taking advice and seeking for information; but it ought to be done in a way not subject to abuse, not to create by usage the post of official advisers.—The extra-constitutional practice of assembling the heads of departments to advise the president has now been so long established, that the *cabinet council* is as familiarly spoken of, and is as well known, as if it were established by the constitution. This practice did not, I believe, originate with Mr. Jefferson; but he is the first president, as far as my information goes, who has endeavoured to interpose its resolutions between himself and the people, and to divide, at least, that responsibility which he incurs for all official acts. Here we see how easily, how imperceptibly radical abuses creep into the best governments, and how jealous the people ought to be of the slightest innovation. It was right in the president to seek information and ask advice, it was natural to have recourse to the heads of departments, it was convenient that they should assemble to interchange their opinions, and, in most cases, that opinion being either agreeable to the president for its conformity with his own, or of sufficient weight to carry conviction, that opinion is followed. In all this there is no danger; but in process of time, this assemblage of friends acquires a name in the government; it is a *cabinet council*, and has weight with

the people. The president's responsibility is lessened when he acts in conformity with this advice, it is increased if he disregard it; and as he can generally manage to secure a concurrence with his own opinions, those of the council are always ready to divide with him that responsibility which the constitution, in its purity, intended to cast upon him personally and alone; and thus a branch of government is imperceptibly created, totally unknown to the written constitution. Hitherto we have seen, in the progress of enquiry, the heads of departments transformed into a privy council, but occupied only with affairs of state, unconstitutionally, it is true, sharing the duties and the responsibility of the executive, but interfering with no other branch of government. It was reserved for Mr. Jefferson (*if his statement be correct**) to invest them with the powers of a court of justice; and if the first decision of this *Star Chamber*† court be submitted to with the apathy that has hitherto prevailed, we need no prophet to assure us that I shall in due time have other companions in misfortune: all cases of public claim to lands, of intrusion, of nuisance, will find their way to this secret tribunal. It ought to be preferred by the public to every other. Defect of title forms no impediment to recovery; the best title in the possessor is no bar to his expulsion; witnesses are not wanted where evidence is dispensed with, and the expense of jurors and salaries of judges are saved in cases too nice to be trusted to the blunt integrity of the one or to the unsophisticated learning of the other. With all these advantages the *cabinet court* will always be preferred, where vengeance is to be wreaked, or popularity gained; and I entreat the people of America to reflect that from smaller beginnings than this, the most oppressive institutions have corrupted other governments, and may destroy our own. Although I have anticipated some of the

* I hope this reservation will be recollected in all I say on this subject. The characters of the gentlemen composing the cabinet, their known attachment to the constitution, independent of other circumstances to which I have alluded above, (p 33), forbid my giving credit to the broad and unqualified statement which asserts their co-operation.

† I *libel* the star chamber and *degrade* the cabinet court, if that court ever existed, by the comparison. There was nothing so odious in the English tribunal as the inquisitorial proceedings stated by Mr. J. to have taken place at Washington; and the right of condemning unheard, would suffer by a comparison with the limited powers of the English court, which, in the plenitude of its power, called on the defendant for his proof, though they sometimes disregarded it

arguments on this head, I am yet bound to make out more fully the allegation that the cabinet council, *according to Mr. Jefferson's account of their proceedings*, assumed judicial powers, that they were unconstitutionally exercised, and tyrannically executed, and that as the whole was done at the president's request, and under his authority, *if his statement be correct*, though others may share they cannot lessen his guilt.

The convocation of the heads of departments "to whom the papers had previously been communicated," is distinctly stated (page 21). The first law officer of the United States attended, and "gave all the lights which it was his office to throw on *the subject*." And what was the subject? The right of the president to dispossess certain individuals at New Orleans of lands which they had acquired by fair purchase, and under the decree of a competent court. This right was to accrue in one of two ways.

1. From the individuals being intruders on public lands.

2. From their having been guilty of raising works injurious to the public safety.

Both these are judicial enquiries, the first of civil, the second of criminal law.—To come to any decision on the first, the point of property must be investigated, and afterwards that of possession; and to determine the second, the fact charged must be proved on the persons accused, and the illegality and injurious nature of the works complained of must be demonstrated.

The task then undertaken by the president and his council, was a judicial one in the strictest sense of the word, and they applied themselves to it with some degree of form. A preliminary question to be decided by a court enquiring into a case is, By what rule are we to decide? what law is to govern the case? and we accordingly find that this was the first object of attention with our new tribunal. "The first question occurring (says Mr. Jefferson) was, what system of law was to be applied to them?" They adopt the laws of France, and then they, or Mr. J. (for it does not clearly from his style appear which) reason through forty pages upon the law and the fact, and having clearly settled both in their own minds, they are convinced of the guilt of the accused, and (p. 64,) we have the important enquiry in the criminal cause: "What was to be done with such an aggressor?" Having with a humanity for which I can never be too grateful, determined that though he richly deserved it, they

would not *burn him alive*, they proceed to declare what sentence shall be passed on the civil side, or to give Mr. Jefferson's words: "The question before *us* was, what is to be done? What remedy can we apply authorised by the laws and prompt enough to arrest the mischief?" The points of law and of fact determined by this tribunal are then resumed and stated with precision, and we at length come to the decree which is thus rendered, (p. 72): "On duly weighing the information before us, which though not so ample as has since been received, was abundantly sufficient to satisfy us of the facts, and has been confirmed by all subsequent testimony,—we were *all* unanimously of opinion that we were *authorised* and in *duty bound* without delay to arrest the aggressions of *Mr. Livingston* on the public rights, and on the peace and safety of New Orleans, and that orders should be immediately dispatched for that purpose, restrained to intruders since the passage of the act of March 3d."

Here is the sentence, and I am mistaken if a more formal one ever received the sanction of a court.

First we are told that they "duly weighed the information *before them*," and though, to be sure, it was not *so ample as has since been received*, yet it was abundantly sufficient to satisfy them of the facts. Here then is a decision in form of the facts in the case.

But, lest any doubt should be entertained of the jurisdiction of the court, an elegant pleonasm is introduced to mark this feature strongly, and shew that no doubts were entertained, at least by the judges, on this subject. We were *all unanimously* (says the classic Jefferson,) of opinion, "that we were *authorised* and in duty bound to arrest the progress of Mr. Livingston." Here the offender is pointed out, and his double aggression distinctly marked; he is found guilty of offences against the *public rights*, and the *peace and safety of the city of New Orleans*.—This is the conviction; in the sentence, I confess, there is more obscurity than I should have expected from the pen of the enlightened chief of the tribunal. "Orders, it is said, should be immediately dispatched for that purpose," (viz. to arrest the aggressions of which I had been found guilty). What those orders were, in what manner the evil was to be arrested, does not appear by the record; they had confidence in the president, perhaps, and left this to his discretion;—but the obscurity is cleared up by the execution which immediately followed the sentence.

It consisted of an order from the secretary of state to the marshal to remove all persons from the batture, who had taken possession since the 3d March, 1807. The civil power is to be first employed, and in case that should prove insufficient, the secretary at war, another member of the court, orders the military force to carry it into effect.—The sentence was executed, and the unfortunate offender thus legally, fairly, and constitutionally condemned, was reduced from affluence to poverty, from the prospect of independence, to a life of solicitation and labour.

I must be understood, throughout this part of my argument, to speak hypothetically, on the supposition that Mr. Jefferson's statement, of which I have repeatedly expressed my disbelief, is true in all its parts; that the heads of departments did actually sit in council with the late president on my case, and that after deliberating on the subject, they *unanimously resolved* (*as in duty bound*) that I should be dispossessed of that property, or in other words, that my supposed aggressions should be arrested, in such manner and by such means, as the president in his discretion should think proper. Admitting this to have really been the case, I think I have sufficiently shewn that these proceedings amounted to the institution of a *court*, for the decision of the right to property in a manner unknown to the constitution and subversive of its principles. Should it, however, be objected that the decision was not conclusive, that this court or council, as it may be called, only determined the right of possession, I answer that the right of possession is no less the object of judicial enquiry, than the right of property. Should it be said that the order to remove only affects the possession and not the right to possess, my answer is, that in many cases, such as loss of title deeds, actual possession is the only means of securing the right of possession and even that of property,—and that again, the determination of a question which affects my actual occupancy, is a *judicial decision*.—Can it make the slightest difference in its favour, that this proceeding was a decision between the nation and an individual in favour of the rights of the former? The evil intended to be guarded against by distributing the judicial power into other hands than those of the executive, was not so much the fear that injustice would be done in controversies between individuals, as to secure the citizen from the oppression of the man in power, private rights from encroachments which are always made under the specious pre-

tence of public good. In republican Rome, when the sovereigns were too numerous to be satisfied with the confiscation of individual estates, whenever a demagogue wanted to rise from obscurity, he proposed a general pillage of the rich, under the form of an agrarian law, or of an abolition of debts;—under the emperors, imaginary plots answered the purposes of transferring the inheritance of the richest senators into the imperial coffers; and in both instances, the *rights of the public*, the sacred *interests of the nation*, was the pretext.—Amidst all this public rapacity, private justice was distributed between individuals with an even hand, and some of the most revered sages in civil jurisprudence flourished under the most detestable tyrants of the Roman empire. The injustice of the Star Chamber could never have become proverbial, but for its decisions in cases between the sovereign and his subjects, and Jefferies himself was not remarkable for any outrage in deciding individual rights. The danger then from the assumption of judicial power, is not the less apparent because it was made in favour of the government. It on the contrary aggravates the offence, and I think I have succeeded in shewing that *if the cabinet council actually took the part which Mr. J. attributes to them* in this affair, they have combined with him in the assumption of judicial powers, and have exercised them not only unconstitutionally, but with cruelty and oppression. Should they be unjustly accused, it is not I who have calumniated them. On the contrary, from the character those gentlemen deservedly enjoy, I cannot avoid believing that there is much misrepresentation as to their agency in the business. Should there be none, they must participate, though they cannot lessen, the responsibility of the late president; the whole proceeding was carried on under his name, and *he*, (whoever advised or consented to the measure) *he*, is individually responsible to his country for the act.

3. The unconstitutionality of the law, under the president's construction of it, may also be shewn by a recurrence to certain fixed and sacred privileges which that construction violates.

The seventh article of the amendments provides, that "No person shall be deprived of life, liberty, or property, without due process of law." The ordinance which formed the constitution of this territory at the time, contains a similar provision, but in words which have become sacred as well as technical,—"No man shall be deprived of his liberty or property but by

the judgment of his peers, or the law of the land." By both constitutions the trial by jury was established. Now, leaving for a moment out of view the right to a trial by jury, what is this law of the land by which alone a man may be deprived of property? An arbitrary act either of the legislature or the executive, or of both? Certainly not. Those arbitrary acts were the very evil intended to be guarded against. It means a process according to the general course of judicial proceeding; a fair, open, impartial trial, as contra-distinguished from secret, inquisitorial investigations, and open, violent inroads upon property. But will the sophism be repeated, that this secures the citizen in the possession of *his* property, not in that of the public;—that if the public seize their own, they may do it legally, without any previous investigation.—But who is to decide whether it belongs to the individual or the public? The government itself. But what branch of it? The executive in the first instance, says Mr. Jefferson, and the legislature afterwards, to correct his errors. This is the political heresy which I wish to refute; this is the dangerous doctrine to which I wish to call the attention of the country.—Had it been only the false theory of a man no longer in office, it would, with some of his other theories, have been laughed at, and forgotten. But he has practised under it, it has become a precedent, and, *as he says*, was sanctioned by the opinion of those now at the head of our government. If the doctrine be dangerous, if the precedent be ruinous, ought it not to excite attention, and become alarming? In treating this part of my subject, my own injuries, great as they are, escape from my view, they sink before the magnitude of the danger which threatens a people insensible to such acts of arbitrary power, to the ruinous tendency of the principles by which they are attempted to be justified.

Let us fairly state those principles. They run throughout the whole book, but are condensed in p. 68.

The nation has a right to take property into its own hands *by force*, and without any previous trial, when that property is its own.

While the property is retained in the hands of the nation, it is not under the jurisdiction of any court, and consequently cannot be claimed by law, because the United States *cannot be sued.*

These are the principles: let us now see whether the nation has a right to take its own at *short hand*, as Mr. J. most em-

phatically terms it.—But as this expeditious act of justice cannot be performed by the whole nation, nor by all the branches of its government, to whom is it to be entrusted? The practice, in this case, says to the *executive*. The executive power is vested in one man, called the President. This one man then may seize, at short hand, all property of the public which he finds in the possession of individuals. But how is he to ascertain what belongs to the public, what to the individual who occupies it? The answer again given, as well by the practice as the theory of our author is, that he is to get such evidence as satisfies himself: he is to be the sole judge, he is to form his own law, he is to collect his own evidence, or to act without it; he may listen to his own prejudices and consult his own popularity, or he may become the contemptible instrument of the animosities of others.—Whenever, then, he erroneously thinks, or wickedly affects to think, that land in my possession belongs to the public, the president may order a regiment of dragoons to drive me from it at the point of the sabre;—and, as he may keep as well as take, for the use of the public, according to the second branch of his doctrine, I cannot recover the possession, even with the best title, *because the public cannot be sued!* But I have some redress: the man who commits this illegal act is surely responsible to me in damages. No! I can sue him no where but in the scene of his oppression, where he takes care only to be present by deputy. A quibble, drawn from the common law, saves him from all the consequences of one species of action, and against any other he whines out the old threadbare excuse, it was an *error of judgment!*

Is there, then, no resource?—does Mr. Jefferson's doctrine point to no mode of relief where property has been improperly taken? Yes; if the congress choose to sell the lands you may sue the purchaser, and if they keep them in their own hands, you may petition congress.—"The holders of property are safe against individuals by the law, and against the nation by its *own justice*." This is a pretty phrase, but what does it mean? That the sufferer has a right to petition congress for relief, who are to constitute themselves into a court of justice for the purpose of hearing the cause. They are to examine witnesses, study documents, hear counsel, weigh authorities, and then decide on every case in which the power of the president, or the legality of his acts, may be called in question. They are to give

up the great concerns of the nation to judge particular claims, or they must postpone the latter until the business of legislation is completed. Admitting that it is possible in a body consisting of two numerous branches, to perform the duties of a court, and to investigate titles, I ask how is it possible for them to go through with the task, without totally neglecting their first and most important concerns. The examination of my title alone, the depositions of witnesses, the pleadings of counsel, the investigation of records, and the researches into foreign laws, necessary to a full understanding of the case, would have occupied them many months; and when all this should have been performed, and one house should be prepared to render judgment, the same task would be to be gone through in the other; and in the end, among near two hundred judges, how many different opinions are to be expected, how many different ideas of fact, how many different deductions of law! what a variety of projects for the final sentence, each one supported by long speeches from the proposers! what endless argument! what confusion! How is it to be terminated? By a total denial of justice; by a delay, which is as bad; by compromise of individual rights, to suit political purposes. This is a faint, a very faint and imperfect picture of the consequences of that system, which Mr. Jefferson tells the people of the United States is *their* system of government;*—which he represents as referable to the examination of questions of right before "*irresponsible judges*," as he contemptuously terms the judiciary.—Unhappily for me, a part of this picture is drawn from nature. I have been forced to take the course which he has pointed out. I sought for redress from the legislature. I found there some friends: my cause had able and zealous defenders. It was considered, as it really is, not only a grievous oppression to an individual, but an alarming stretch of power, which, if unnoticed, would grow into a destructive precedent.—Notwithstanding all this, I was kept from my family and my means of subsistence, soliciting

* The celebrated lines of Otway on the tyranny of the Venetian Senate, have been so hackneyed by frequent quotation, that they have lost much of the effect which they are calculated to produce on the minds of reflecting men. But it is a lamentable truth, that they would not so often have been quoted, if cause had not been so often given for their application; and the present instance too clearly shews, that, even under the best constituted governments, magistrates will be found, who, while they violate the most sacred rights of citizens, "TELL THEM 'TIS THEIR CHARTER."

relief, for more than two years.—During all this time I could not obtain even a hearing. All I solicited was some mode of trial, some tribunal to which I might apply for redress. One plan after another was formed, debated, and rejected for another which shared the same fate.—Every fair and honourable means of solicitation was resorted to, every thing that I thought could excite the interest which my case merited—flattered with hopes to-day—cast down with despondence on the morrow, I felt, during all that period, the miseries of a life spent in solicitation and dependence.* If, as a suitor for justice, I could have resorted to a court, I should have asserted my right and been certain of a decision. I should not have entreated for that which was my due: but in this body, which, according to Mr. Jefferson, is so admirably constituted for the trial of titles, the most unremitted solicitation is necessary to prevent your case being stifled under the mass of public and private business which occupies the attention of congress.—I did solicit, but it was in vain;—I did entreat, but I was not heard. Congress did not, would not, nay, they could not themselves investigate the merits of my case. A majority were for giving me some trial, but they could never agree on the mode; and finally, in despair, I withdrew my petition.—This was the result of my pursuit of relief from congress; and to this result my inhuman adversary adverts with malignant triumph in the close of his work, where, by an irreverent allusion to the scriptures, he enriches the language with a new word, to express his mockery of my complaints. They may be *Jeremiades* in the Frenchified diction of the member of the national institute—but none of them contains

* Ah! little knowest thou, who hast not try'd,
What hell it is, in suing long to bide,
To lose good days that might be better spent,
To pass long nights in pensive discontent,
To speed to-day, to be put back to-morrow;
To feed on hope, to pine with fear and sorrow;
To fret thy soul with crosses and with care,
To eat thy heart through comfortless despair;
To fawn, to crouch, to wait, to ride, to run,
To spend, to give, to want, to be undone;
Unhappy wight! such hard fate doom'd to try;
That curse Go send u to mine enemy.——SPENSER.

I quote this passage from memory, nd may ot, pe h s, have given in every line the exact words of the admirable author. But I have keenly felt all that he describes;—all, but th sent ment expressed in the last line, in which I sincerely declare I do not participate.

a word, either untrue or debasing, one phrase beneath the dignity of a free citizen who knew his rights. The public shall judge.—I had solicited, as I have said, during several sessions, and was constantly flattered with the adoption of some plan that would secure me a fair trial. A bill was before the house and would probably, could it be taken up, pass; but congress were about to adjourn, the members were impatient to return to their homes, and I feared that, unless some effort were made, the adjournment would take place before the law for my relief could pass. I wrote the following letter, which Mr. Jefferson has selected as a subject of pleasantry in two different parts of his work. It was a circular, addressed to the members of the legislature, in these words:

"SIR,

"The peculiarity of my situation will justify me in renew-
"ing to you individually, the appeal which has repeatedly been
"made to the honorable body of which you are a member.
"Without entering into any other circumstances of my case,
"thus much is without dispute;—that without trial or any judi-
"cial process, I have, by military force, been driven from the
"possession of a real estate, of which I was the *bonâ-fide*
"purchaser, for a valuable consideration, from a person in pos-
"session, and under a title recognized to be good, by the sen-
"tence of a competent tribunal, judging in the last resort;—that
"I am an American citizen, and have never done any thing to
"forfeit the rights to which that quality entitles me: and that the
"United States being in possession, I have no remedy at law.

"Whether the law of 1807, authorizes the proceedings
"against me or not; or whatever were the motives of those
"proceedings, my case is equally one of PRIMARY PUBLIC CON-
"CERN, and is that of every individual in the community, for
"no one has any *legal* security which I had not. If the law
"authorizes such proceedings, it is unconstitutional; if it do
"not authorize them, the misconstruction ought to be remedied.
"I might therefore, sir, without presumption, *claim* that inter-
"ference, as a matter of the highest public duty, which, in my
"present situation, I am content to *solicit* as a private favor.
"Deprived of a fortune that would place me in a state of inde-
"pendence, I am, by the act of the government, reduced to
"poverty, and exposed to the pursuits of creditors whose pa-
"tience will, I fear, be exhausted by further delay: twice obliged

"to leave my profession and place of abode, my means are ex-
"hausted, and my business lost. Under these circumstances, sir,
"I am persuaded that you will not suffer the trifling inconve-
"nience of a few hours delay, to balance the utter ruin of a fellow
"citizen, who cannot trace misfortune to any imprudence of his
"own, and who only asks that FAIR TRIAL which the constitution,
"you have sworn to defend, secures indiscriminately to all.

"EDW. LIVINGSTON.

"23d June, 1809."

If there be any man who can join Mr. Jefferson's merriment at the terms of this letter, I do not envy that man's enjoyments, and would much rather be the sufferer under the wrongs there detailed, than the one, however high his office, who could first inflict and then deride them.

I have digressed, and return to the course of my argument. Congress cannot, then, from the nature of their organization, from their necessary attention to more important business, occupy themselves with the investigation of titles; but if they had the power, whence do they derive the right?—certainly not from the words of the constitution,—that, as we have seen, gives the judicial power to a separate body. Not from the practice of other nations, because we have seen, that in all others, even of the most absolute form, means were provided to prevent the nation being both party and judge,—not from any necessity, because, if that were the case, it would exist in other nations as well as ours; but practice seems to be resorted to (p. 68.) and the principle that the nation cannot be sued. That the nation cannot be sued does not prevent relief being granted, when the action is *in rem.*—I cannot sue the United States for a debt they owe me, I cannot attach their duties in the hands of the collector, or serve an execution on the monies in the treasury,* but I may form my action for the recovery of my land, by a process *in rem.* The public, then, like any other claimant, may

* Hence arises the necessity to petition in case of *money* claims, but wise men have thought that the public would not lose by establishing some permanent tribunal to take cognizance of them; in most instances the wages of members while the justice of the demand is discussing, amount to more than the debt: one for the value of a horse I found when I came into Congress in 1795. I left it there in 1801, and I believe it was finally decided ten years afterwards. The discussion of this claim alone must have cost at least 25000 dollars. In a Court of justice the costs would not have been one hundred.

assert their right, and the judges will determine on it, without any reference to Congress, and so far I misconceived my remedy while I was vainly seeking relief from the legislature. This course of proceeding is not new nor beneath the dignity even of *our* government. It is every day's practice in the courts of admiralty; should a collector or any other officer seize a vessel as belonging to the United States, a libel would be filed by the proprietor, and it most certainly would not be dismissed on a suggestion that it was the property of the United States, their title must be set forth and tried in the same manner as the title of an individual.—Where then is the difference if I direct my action against the land; must not the public as well as any other claimant set forth their right and recover or lose, according to the strength or weakness of their title. If this reasoning be just, Mr. Jefferson's ideas on this head are totally unfounded, and Congress have neither the physical power, from their organization, nor the constitutional right to try titles, and of course there is no check to that assumed by the President of judging what lands belong to the public or not; he acts without appeal, without control and without responsibility, and I, therefore, under our government, am warranted in my conclusion that he acts unconstitutionally.

I have proved, therefore, under this head;

1st. That my case is not one embraced by the purview of the act of March, 1807.

2. That if it were, the directions of the act have not been pursued.

3. That as construed and acted under by Mr. J., the act is unconstitutional.

All these conclusions were so apparent, that in a few hours after the president's mandate had been received at New Orleans I had stated the substance of them in a petition which I presented to the superior court, praying them to enjoin the marshal from executing it. The order to that effect was given, not as Mr. Jefferson (with his usual attention to fact) asserts, by a *single judge*, but by the two who composed the court, and on motion in open court.* This order was served on the marshal,

* I should not notice this little aberration if it were not wilfully made. My petition with the signature of the *two* judges was before the president; it is

who disregarded it; and his disobedience is justified by Mr. J. by reasoning which involves in it an attack on the regularity of the proceedings and the judgment by which Gravier was quiet-

published p. lxi. of *the case for opinion of counsel*, and I insert it here at length, that the reader may judge for himself.

To the honourable, the Superior Court of the first District of the territory of Orleans.

The petition of Edward Livingston, of the city of New Orleans, counsellor at law,

Humbly sheweth,

That John Gravier by virtue of sundry grants from the crown of France, and divers mesne conveyances under them, in the month of November, in the year of our Lord, 1805, was possessed of and entitled to a certain farm, or parcel of land, part of which had been previously laid out into streets and lots, and was and is known by the name of the Suburb St. Mary: That the said farm had, for sundry years past, increased by an alluvion formed by the river Mississippi, which is the front boundary of the said plantation, and which by the laws of the land, became (in proportion as the same was formed) the property of the said John Gravier, and of the several proprietors of the said plantation under which he held, and was incorporated into the body of the said plantation, and by the laws aforesaid, was so held as part of the same.—But the said John Gravier, and those under whom he claims, have uninterruptedly held the said plantation, of which the said alluvion so formed a part, for upwards of eighty years, until some short time previous to the month of November, 1805, when the mayor, aldermen and inhabitants of the city of New Orleans, having disturbed him in the enjoyment of the said alluvion, he presented his petition to the superior court, to be quieted in his possession, and relieved against the said disturbance, and that such proceedings were thereupon had, that the said Superior Court on the 23d of May, 1807, pronounced the decree, a copy whereof is hereunto annexed, in pursuance of which decree the said John Gravier was put in peaceable possession of the said alluvion, and the said mayor, aldermen and inhabitants were perpetually enjoined from disturbing him therein; and your petitioner shews that since the rendering the said judgment, he hath purchased from Nicholas Girod, and the trustees of Peter Delabigarre, under the title of the said John Gravier, and from the said John Gravier himself, in all, for the sum of eighty thousand dollars and upwards, all that part of the said plantation and alluvion, which is bounded on one side by the road, and on the other by Mississippi river, and extends from the limits of the city to the street called *Rue Julie*, of which your petitioner was put in possession and on which he has expended very large sums in improvements, and particularly in making a canal and levée, which are nearly complete: That your petitioner is informed, and verily believes, that the president of the United States, being ignorant of the true circumstances of your petitioner's title, but instigated, as he believes, by some malicious misrepresentations of your petitioner's enemies, has given directions to F. L. B. Dorgenoy, the marshal of the district, to remove your petitioner by force from the said piece of land, so purchased by him as aforesaid; and that under colour of an act entitled "An act to prevent settlements being made on lands ceded to the United States, until authorised by law," which law, as your petitioner is advised and believes, cannot

ed in his possession, as well as the issuing the injunction to prevent the execution of the mandate.

The decree of the court, he contends, is a nullity, and is void for three reasons.

1. Because the United States were not a party.

2. Because the court had no jurisdiction of the subject of the suit.

3. "Because it was the result of a process and a course of proceeding and trial belonging to a court whose powers they do not possess by law."

The two last of these objections affect the powers of the court, and (should they be well founded) render the judgment void as to all the world.

apply to your petitioner's case, as by a reference to the said law will more fully and at large appear.

That if your petitioner is dispossessed at this season of the year, the greatest injury will result to him not only by the destruction of the unfinished works, by the annual inundation which may now in a few weeks be expected, but also by the failure of many contracts he has formed, and by the loss of the revenue arising from his canal and basin, for the next year.

And your petitioner shews, that the navigation of the river will be greatly impeded by the half finished works, and that the greatest danger is to be dreaded to the health of the city from the existence of a temporary dyke which it was your petitioner's intention to have removed prior to the rising of the waters—Wherefore and inasmuch as the said order must have unadvisedly issued, as the same is contrary to the treaty by which this country is ceded to the United States, to the laws thereof, and to the constitution, and particularly to that article which declares that no private property shall be taken for public use without just compensation; and also in direct violation of that part of the ordinance for the government of this territory, which directs that no man shall be deprived of his liberty or property, but by the judgment of his peers, or the law of the land.

May it please your honours to enjoin the said F L. B. Dorgenoy, marshal, from executing the said order, and to grant to your petitioner such other relief as the nature of his case may require.

EDW. LIVINGSTON.

Signed and sworn to in open court,
January 25th, 1808.
J. W. SMITH, Clk.

Let an injunction issue agreeable to the prayer of the petition. 25th January, 1808.

GEO. MATTHEWS, Jun.
JOSHUA LEWIS.

I hereby certify that the foregoing is a true copy of the original petition and order on file in this office.

J. W. SMITH, Clk. S. C.

March 28, 1808.

The first, if the United States were a necessary party, will render it void as to them, but good against all others who were parties to the suit.

I have admitted that the United States, if they claimed an interest in the land in their own right or for another not a party to the suit, would not be affected by it. The law cited by Mr. Jefferson is a first principle in the civil, and, as far as my knowledge extends, pervades every other code. But the case would, I think, be different, if the United States claimed not for their own use, but for that of persons who were parties to the suit.—When once a contest is decided by a sentence of the *proper tribunal, regularly judging in the last resort*,—that decision is final, it becomes *res judicata;* for, it is the interest of the commonwealth that there be an end to litigation, "*interest reipublicæ ut sit finis litium;*" and therefore though the judgment be erroneous it must stand.—The principle cited by Mr. Jefferson, is an exception to this rule—the *res judicata* does not bind those who were not parties to the suit; and the reason is, that they had no opportunity to defend their rights. But if the person applying for the benefit of this exception in order to open the judgment, claims no right for himself, but only asserts it for the benefit of another who was a party to the suit, and had an opportunity to defend his rights and did defend them, then the reason of the exception failing, the exception itself must fail with it. *Cessante ratione, cessat et ipsa lex.*

To apply these principles to the case before us: The corporation of the city of New Orleans were parties to the suit in question; they defended their rights, they were heard, they set up, in a motion for a new trial, that very title in the United States which is now contended for, as a bar to the plaintiff's recovery. On a full hearing the court determined against this claim, enjoined them perpetually against asserting it, and quieted the adversary possession. Now let us examine what is the claim of the United States. If *on their own account*, I admit they are not barred; if *for the city of New Orleans*, I contend they are. The purpose for which an act is done, is to be gathered from the declarations, either oral or written, of the actor, or from his conduct. Where the public is the actor, the declarations and conduct of their representative in the act are to be looked to; the president in this case was, as he says, the agent of the United States.

What were his declarations, and what was his conduct? Immediately after he had notice that his orders had been obeyed by the marshal, he sent a message to congress, which he transcribes p. 77 of his work. Speaking of this property he says: "*It has been used immemorially by the city*, to furnish earth for raising their streets and court-yards, for mortar and other necessary purposes, and as a landing or quai," &c.; he next states as an allegation that the title, originally in the former sovereigns, was never parted with by them, but was retained by them *for the use of the city* and province, and consequently has now passed over to the United States. And he adds; "Until this question can be decided under legislative authority, measures have been taken according to law, *to prevent any change in the state of things*, and to keep the grounds clear from intruders." Here is no allegation whatever of any *beneficiary interest* in the United States; on the contrary, a prescriptive title to the usufruct in the city of New Orleans, and an allegation of a mere *trust title* in the former sovereign, to which the United States have succeeded; and the intent with which the possession was taken, is plainly expressed to be for *the use of the city*. It was (says the message) to prevent *any change in the state of things*.—What was the state of things alleged? Why, the use of the property in the city. The president's message, then, as clearly as language can express any thing, tells us that the United States claimed nothing for themselves, every thing for the corporation of New Orleans.—It does more; it informs us, what is exactly the fact, that a court, which I shall shew to be a competent one, having decided on a question of title, the president of the United States interposed his executive authority to correct the errors of the judiciary, and seized the property in question to restore it to the losing party; for he tells congress: "This (the *batture*) having been claimed by a private individual, the city opposed the claim on a supposed legal title in itself, but it has been *adjudged that the legal title was not in the city*." Here, then, is an acknowledgment that judgment was rendered against the claims of the city, and this passage, taken in conjunction with those I have quoted, amount to this: The city have a title to the use of this property, they have used it immemorially; it is therefore theirs by prescription—but an individual has claimed it, and the court has wrongfully given judgment in his favour; I have therefore turned this individual out of possession in order to restore that of the city, in other words

to prevent any *change in the state of things*. On this supposition alone of a claim for the use of the city, can we reconcile Mr. Jefferson's assertions pages 63 and 76, that after the passage of the territorial law, it was in my power to resume my works, by obtaining permission from the jury, and that had I obtained that permission it would have been respected by the national executive. Had the seizure been for the use of the United States, how could a compliance with any territorial regulations enable me to continue the occupation of the property of the United States? How could the *national executive* have had so much respect for the permission of a parish jury, as to suffer the public lands to remain in the hands of an intruder? It is clear, therefore, from all these declarations that the agent of the United States did not seize for their use but for that of the defendants in a suit that had been decided. His acts speak the same language. From the time of my dispossession to the present moment (with a short interval of a few days, during which I resumed the possession in the fall of 1810) *the United States have made no other use of the property than to keep me out, and suffer the city to enjoy*. It would have brought, if sold, some hundred thousands of dollars into the public treasury, yet no attempt has been made to sell; if leased, it would have produced a rent proportionate to such a capital, yet it remains unimproved. The city draws a great annual revenue from the wharfage, digs up the soil when the river retires, and, until it was destroyed by the last year's hurricane, occupied by their guard the house I had erected, though the United States hired buildings for their troops.—All this conduct coincides with the declarations of the executive and plainly shews for whose benefit he acted—and as the rights of that body have been already decided on in a cause to which they were parties, the question as to them can never be legally revived either by themselves or others for their use. Until therefore the United States shall assert some claim of title for themselves, not as *fiduciaries* for the party which is concluded by a former judgment, that judgment binds them.

2. But the court had no legal cognisance of the case, having no jurisdiction over the subject of the suit,—and to prove this we are referred to p. 68, where I find it stated expressly, that "so long as the nation holds lands *in its own possession*, so long they are under the jurisdiction of no court but by special provision;" which special provision, it is contended, is not made in the United States, but that when they come to the

possession of individuals, then the courts are open for the discussion of contending claims. Now, as Mr. Jefferson in his message and elsewhere in his book, tells us that the *city of New Orleans were in possession*, he excludes that of the United States, and shews a case in which by his own acknowledgment the courts may legally decide on the title. I think this a conclusive answer to this head of objection; there are others which I have been obliged to anticipate, to which I refer the reader.*

But it is urged,

3d. That the judgment in the case of Gravier, as well as the injunction issued against the execution of the president's mandate, are void, because "They are the result of a process and course of pleading and trial belonging to a court, they (the territorial court) "did not possess by law."—In support of this objection we are told, that by an ordinance of Congress of the 13th of July, 1787, made for the then territory of the United States N. W. of the Ohio, but extended to Louisiana shortly after the cession, it was provided that there should be in that territory a court consisting of three judges, who should have "COMMON LAW jurisdiction," thus excluding, by a necessary implication, the powers and forms of proceeding of those courts which are known in England and in the United States by the name of *Courts of Chancery*, and in our system of jurisprudence are contradistinguished from those which proceed according to the course of the *English common law*. Thence Mr. J. argues, that the superior court of the territory of Orleans, having no *chancery powers*, could neither issue an *injunction*, nor render a decree to *quiet a possession*, nor try a cause without a jury.

This is, evidently, a play upon words, and the whole quibble turns upon the words "*chancery*" and "*common law*." Mr. Jefferson confesses, (p. 74) that, the latter, as applied to Louisiana, do not mean the "common law of *England*," but "the common law of *this land*," which he acknowledges to be the Roman† or civil law. This is all I desire. I acknowledge

* Ante, p. 145, et seq.

† One of the first acts of the territorial Court, after the transfer of possession to the United States, was a solemn determination that the change of government operated none in the municipal laws. This determination has been uniformly acquiesced in since, and has lately received the sanction of the supreme court of appeals of the state. The common law of Louisiana is therefore established to be the civil or Roman law; and the constitution of this state contains a special clause expressly intended to guard against the introduction of any other system of civil jurisprudence.

that the superior court of Orleans is not a court of chancery, and that it has no powers whatever as such. Mr. J. acknowledges that it possesses the powers of a court of civil law; now, therefore, the only question seems to be, whether such a court has the power to issue an injunction, or quiet a possession, and whether it usually proceeds with or without a jury. Mr. Jefferson triumphantly asks: "Was the establishment of the French and Roman laws an establishment of the chancery system of law?"—The answer is obvious.—It was so, as far as those several systems are similar, but no farther. He again asks: "Will it be said that the Roman and chancery laws, for instance, were the same?" If Mr. Jefferson does not know that the English chancery system was borrowed from the civil law, and that it professedly pursues its forms and modes of proceeding,* I must assent to what he acknowledges in several parts of his justification, that he is not deeply versed in the Roman, to which I think I may add, at least, the English chancery system of jurisprudence. But, however that may be, the question is not here whether the rules and modes of proceeding of the courts of civil law and those of chancery courts are the same, but whether the forms pursued in the case before us were really those which are prescribed and pointed out by the "common law of the territory of Orleans" (which is acknowledged to be here the rule) or in other words by the "Roman civil law?" And, now, it is easy to shew, that there was no need in this case to search or adopt the precedents of an English or American court of chancery, and that neither the action brought by Gravier, nor my petition for an injunction against the marshal were derived from that source; but that they were suits and modes of proceeding as well known and as strictly defined in the civil, as those of *trover* and *ejectment* are in the common law.

It is a fact well known, not only to professed civilians, but to all those who are tolerably conversant in that system,

* This is so well understood in the United States, that by an act of Congress, passed on the 29th of September, 1789, it was expressly enacted, "That the forms and modes of proceeding in causes of equity (chancery) and of admiralty and maritime jurisdiction, should be according to the course of the *civil law*."—This statute has, indeed, been since modified, and the forms of proceeding of chancery courts prescribed by more general words; (2 Laws U. S. 103), but it has never been doubted or denied, that those forms are derived from, and in general conformable to those of the *Roman law*.

that all those objects which are attained after great expense and much difficulty in the English courts of equity, are effected without the complex machinery of different tribunals by the simple practice of the civil law, by the division of actions into those *stricti juris*, and *bonæ fidei*, and the application of the *prætorium jus* to their circumstances; but that disquisition is here unnecessary, for the proceedings in question belong to the most ordinary class, in the code of practice.

INTERDICTS were edicts made by the prætor, declaratory of the remedy he would give in certain cases, chiefly to preserve or restore possession. They were also his decretal orders applying an equitable remedy to the case before him, and in a third sense the term was commonly used for the action which is brought under the prætor's edict.* Thus we say *the interdict undè vi forbids illegal force*, here it means the edict. *The judge rendered an interdict against the use of the servitude*, here it means the decretal order which may be either interlocutory or final. *Titius prosecuted an interdict undè vi against Caius to recover his possession*, here it means the action.†

These interdicts were prohibitory, restitutional, or exhibitory. Of the first kind were those by which the prætor forbid the commission of any illegal act which was apprehended. By the second a remedy was given for acts already done; the third was a process analogous to the writ of habeas corpus, obliging the party having a free person in his custody to exhibit him.

All these remedies were applied by a process, which, to avoid the equivoque that would arise from employing, as in Latin, the same word to signify the edict and the process under it, we call in English an *injunction*. In the prohibitory and exhibitory interdicts it issues at the commencement, in the other at the end of the suit, and so far in the former instances, it is exactly analogous to the chancery injunction of England.

The suit brought by Gravier against the corporation of the city, was an interdict of the prohibitory kind; he was in posses-

* Vide Dig. de Interdict: et Calvini Lexicon, *passim*.

† Interdicti appellatio obscura est iis, qui rem ex antiquitate non satis fideliter perpendunt; ecce autem, sicut duplex censetur bonorum possessio, videlicet edictalis et decretalis; ità docendi gratiâ, statuimus duplex hâc consideratione interdictum: scilicet *edictale*, quod prætoriis edictis proponitur, ut sciant omnes eâ formâ posse implorari; et *decretale*, quod prætor pro re natâ implorantibus decrevit. *Oldendorp*, cited by Calvin.

sion, the defendants had disturbed him, by trespassing on his property and setting up a claim to a *servitude* or commonage on it: his remedy was clearly pointed out by law, without any need of chancery aid; he brought a suit under the prætorian edict *uti possidetis* and obtained the interdict or injunction of the magistrate, forbidding the defendants from continuing their disturbance during the continuance of the suit, and at the end of it, after hearing all parties on the question of title, the same order was continued, or as we should express it accurately in English, the plaintiff was *quieted in his possession*, and the *injunction was made perpetual.*—The only illegality then, of the whole suit, is having translated *interdict* by the word *injunction*, and having used the familiar phrase *quieting in possession*, to express the very idea which those words were meant to convey. Those who are acquainted with even the rudiments of the civil law, will ask no authority for what I have asserted, but I wish to be justified by all, and I therefore state the nature of the action, and shew the law on which it is founded.

"Hoc interdictum (*uti possidetis*) de soli possessore scriptum est, quem potiorem prætor in soli possessione habebat: et est prohibitorium ad retinendam possessionem." Dig. 43. 17. 1. s. 1. "This interdict is made for the possessor of the soil, for his possession is favored by the prætor; and it is *prohibitory* for the purpose of retaining the possession." Godfrey's note on this passage is: "in hoc interdictum venit ut reus desistat à turbatione præsenti et futurâ." "This interdict provides that the defendant shall desist from all disturbance at present *and in future.*"

"Hoc interdictum duplex est, et hi, quibus competit et actores et rei sunt." "This interdict has a double effect, and the parties under it are both plaintiffs and defendants." Dig. 43. 17. 3. s. 1.—From these authorities (and I might multiply them without end) it appears that there was a course of proceeding in force in this country, by which one who was troubled in his possession might apply for and obtain an order of the judge enjoining his adversary to desist from his encroachment, or in other words obtain an *injunction*, and that, after the title was determined, that order might be extended to all *future* aggressions, that is to say *the injunction might be made perpetual.*

Now, this is exactly the course that has been pursued. Gravier being disturbed in his possession, by the city of New Or-

leans, commenced his suit, not by *bill in chancery*, as I shall presently shew, but in the manner prescribed by law for the prosecution of all suits.—He obtained an *interdict* directing the defendants to desist from trespassing on the lands in question, *pendente lite:*—the defendants appeared, denied the plaintiff's possession and his title, and set up one in themselves;—the case was heard, and the court being of opinion that Gravier had both the possession and the title, ordered the interdict to be made perpetual, and declared that he should be protected against the defendants in the peaceable enjoyment of the premises forever. Now, what is the objection to this course of proceeding? Why, truly, the judges have rendered their orders and decrees *in English!* They have translated *interdict* by *injunction*, and have *quieted a possession*, instead of ordering an *interdict* against future disturbance. The vivid imagination of our author was fired with the illegal use of chancery terms. Anxious to support the constitution, and keep every branch of government *except one* within the bounds of their duty,—he takes pains to prove to the judges that they are not chancellors, reproaches them bitterly and indecently for "*shuffling themselves* into the place of the jury," and raves about chancellor Waltham, and his *subpœna*, just as if the *subpœna* had been used in the case; nay, he actually asserts it as a fact, when it exists no where but in the series of fictions which he calls "*the proceedings of the executive.*"—The same law which authorised the granting and continuing the injunction in the case of Gravier, justifies the Court in the order given to the marshal on my application.—I was in lawful and peaceable possession, and I knew that an illegal mandate had been given to deprive me of it; mine, therefore, was the very case provided for by the interdict *uti possidetis*, and it is their having dared to grant me the benefit of the laws of my country, that has drawn upon the judges the ire of the President.

They granted the injunction, as it was their duty to do; the marshal, disregarding that which he owed to the laws, and supposing himself, as he has stated, bound to the same obedience which a soldier owes to his officer, disobeyed the injunction, and, by force, executed the orders of the president. Here was a scene which, for the honour of my country, for its most sacred interests, I pray never to see repeated; an executive

officer carrying into effect an executive mandate, in contempt of the solemn decrees of the judiciary, and the president ordering the regular military force to aid him in the accomplishment of this outrage.—Let it not be said, that he could not know that the court would interpose—but he *did* know that the court had interposed: he *had* seen their judgment, and it was in direct *defiance* of this judgment that he gave the order. Besides, he afterwards *knew* the act, and made it his own by his *ratification*. He even now *justifies* it, and though all the probable consequences were stated to him of a conflict between the authorities, he heard them in sullen silence.* There is then as little justification for Mr. J. as

* After I had received the president's determination, in 1808, not to grant me any relief, I wrote to the secretary of state the following letter:

Washington, July 13, 1808.

Sir

In the letter I had the honour to address to you on the sixth of May last, I offered propositions, which, after making every allowance for the illusions of self-interest, I cannot but think highly evincive of the justice of my claim.—They were also intended to shew the confidence I then felt, that the president would seize the opportunity they offered, of reviewing a determination made on an *exparte* statement, which I have offered, and am ready to prove false in fact and erroneous in law.

It having been deemed inconsistent with official duty to examine my proofs, or to listen to my argument, I must at present content myself with the consciousness of having done every thing that a sense of justice, and the extreme of moderation, could require. The representatives of the people, to whom I am referred, must determine whether they are competent to the trial of a title, and whether they intended to invest the executive with the power of reversing the decision of a court, of opposing the execution of its decrees, and depriving a citizen of his property, without even the form of a trial, or affording him the means of defence.

I must however, sir, be permitted to draw your attention to another circumstance in this business, which is of the utmost consequence not only to me, but to the territory in which I reside. From the verbal communications which I had the honour to make to you at this place, supported by a copy of the record, which I delivered for the president's perusal, it appeared that when I first heard a warrant had been received by the marshal to divest me of my property, I applied by petition to the superior court who, on hearing, granted me an injunction, ordering the marshal to desist from the execution of the warrant; but that this officer, supposing the authority of the president paramount to that of the court, proceeded to execute his orders. For this contempt offered to the highest judicial authority in the country, I might have obtained an attachment and an order for restitution; but I was unwilling to exhibit to the inhabitants of the territory the degrading spectacle of a court unable to execute its decrees, or the afflicting one of a violent struggle, perhaps a bloody conflict between the ministerial officers of judicial and executive power. Persuaded

there is foundation for the charge, that the court assumed illegal powers; they proceeded in the beaten track of ancient usage and established law; he deliberately and violently opposed their legal course of proceeding.

But no jury was called for the decision of the cause! *The judges shuffled themselves into the place of the jury!* They have "abolished the trial by jury, pledged by the ordinance to the

that the warrant had been issued in consequence of some gross misrepresentations of facts, I desisted from any further prosecution of my appeal to the laws, and thought that propriety required me to suspend any to the public, until I should have endeavoured to rectify the errors under which I supposed the president had acted. With this view I applied myself silently and assiduously to the removal of those pecuniary difficulties, which this unexpected change in my fortune had produced, and, as soon as this was sufficiently effected, came on with a hope bordering on conviction, that when heard (which I considered as a matter of course) I could demonstrate to any reasonable man, not only that I had been hardly dealt with in the mode of proceeding, but that there was not even a colour of title in the United States to the land of which I had been deprived. As however it has not been deemed expedient to admit even a possibility of error or misreprentation; as the appeal which I have made to the candor of the executive has failed, it may become necessary for me to prosecute that which I have made to the justice of the courts. But this statement will shew you, sir, how important it is for me to ask, which I now most respectfully do, whether it is the intention of the president that the marshal shall use the force placed at his disposal to oppose the decrees of the territorial judiciary? If, as I hope, and would wish to believe, the ordinary course of justice is not to be interrupted, I have only to request that orders, conformable to such intentions, may be sent to the marshal, whose conduct has shewn that he is under a contrary impression—and it would be desirable to avoid that opposition to which his mistaken sense of duty might lead. But if the president's warrant is to be supported by force against the process of the court, I ought to be apprized of it, that I may then determine whether the obligation I owe to my family or my professional duty, to a widow and two orphans, whose rights are committed to my care, will permit me to sacrifice their interest, in order to preserve the peace of the territory; or whether I should assert my claims, and leave the responsibility where it ought to rest.

If the United States have no title to the land, no reproach can attach to me for any event that may happen, and I am prepared to risk every thing on that question, whenever it shall again be decided by impartial and enlightened men. Being about to depart in a few days, and wishing to carry the president's determination on that point, I beg that, as soon as may be convenient, you will favour me with an answer, and at the same time return the copy of my petition for an injunction, which I had the honour to deliver you at Washington.

I have the honour to be,

Respectfully, &c.

(Signed) EDW. LIVINGSTON.

To the part of the letter relating to the injunction, I received *no answer*.

people of the territory." "They took upon themselves to decide both fact and law, aware at the same time, that a jury could not have been found in Orleans which would not have given a contrary decision."—These are serious charges. They affect the character of men whom Mr. J. calls *respectable*, though he attributes to them a conduct that would disgrace them for ever, of men whom he had invested with the highest judicial authority, and to whom it has been continued* by the representatives of the very people whose privileges he accuses them of having destroyed, and whose interest, he says, they have illegally sacrificed by this decision.

When deceived by false appearances, such accusations are made under a belief of their truth, the author incurs the reproach of precipitancy, and owes a reparation to those whom he has injured.—Where there is no proof, and he acts only on suspicion of the fact, his offence assumes a graver cast. But what name shall we give to his conduct, who *knows* that the charge he makes is wholly without foundation, who *acts* without proof and without suspicion, who *repeats* serious charges after he has *seen* their refutation, and *knows* that refutation to be *just*.

I have shewn that the form of action as well as the process was in the usual routine of judicial procedure: that no chancery or other extraordinary jurisdiction was resorted to, and I now proceed to show, that this course did not deprive the defendants of an appeal to a jury; that if they declined it, it was the result of deliberation and choice; that there was no *shuffling* on the part of the judges, no assumption of illegal power, and that he who makes the charge had, at the time he wrote, under his eye the evidence of its falsity.

The act of the 26th March 1804,† gave us our first form of government. On the subject before us its provisions are: §5. "In all cases, civil and criminal, in the superior court, the trial shall be by jury, *if either of the parties require it*."

On the 2d March 1805,‡ the president was authorised to establish a government in Orleans, similar to that exercised in

* Judge Mathews is one of the judges of the supreme court of appeals, and judge Lewis presides in the district court of the first district of the state of Louisiana.

† 7 Laws U. S. 112. ‡ Ibid. 281.

the Mississippi territory *(except as is otherwise provided by the act)* and giving to the inhabitants all the rights, &c., secured by the ordinance of 1787. But the fourth section declares, " That all laws in force in the said territory (Orleans) at the commencement of the act, and not inconsistent therewith, shall continue in force until altered, modified or repealed by the legislature;" and the sixth repeals, after the first November then next, all such parts of the former act, as are repugnant to the present act.—The ordinance, which is thus made the constitution of the new territory, secures to the " *inhabitants the benefit of the trial by jury.*"—This benefit, it was supposed, would be secured to them, if they had the option of recurring to it; and that part of the law of 1804, which directed that, in civil cases, either party might have a jury trial, *if he required it*, was not inconsistent with the provision of the ordinance, which secured the benefit of a jury trial to the inhabitants, and that, therefore, this clause was not repealed.—Under this idea the territorial legislature proceeded to regulate the proceedings in the superior court. By the first section of the act passed for this purpose,* all suits are directed to be " commenced by petition addressed to the court, which shall state the names of the parties, their places of residence, and the cause of action, with the necessary circumstances of places and dates, and shall conclude with a prayer for relief adapted to the circumstances of the case."—This was exactly done in the case of Gravier, and even if I had not shewn that the form of action adopted had been previously known to the civil law, this provision in a positive statute must have put an end to the cavil.—The fifth section enacts, that if the " *Defendant wishes a trial by jury*," his " petition shall conclude with a prayer to that effect;" and if any plaintiff requests a trial by jury, such request shall be lodged in writing with the clerk, within three days after receiving notice of the filing of the defendant's answer,"—and thereupon the clerk is to issue process, and the sheriff is to summon the jury.—As there is no difference in the mode of commencing causes, all of whatever nature being by petition, the provisions relative to the trial by jury are applicable to all; whenever a fact is in issue, either of the parties may refer its

* 10 April, 1805. 1 Orleans Laws, 210.

trial to a jury; and it is, therefore, only in cases where both prefer the decision of the court, that the court decides. This *now is*, and *always since the passage of this law has been* the uniform unquestioned practice of the court. The corporation of the city of New Orleans, on being served with a copy of Gravier's petition, were at liberty to demand a jury or submit to the decision of the court. They had time to deliberate until the filing of their answer. They did deliberate, and, with the advice of their counsel, preferred the latter mode of trial, as the most favourable to their interests.—Does not this plain exposition of the law shew that there is not the slightest foundation for the invective and bitter reproach with which the judges are assailed on this subject?—Can any one acquainted with the laws I have cited, for a moment question the regularity of the proceeding?—But Mr. Jefferson was acquainted with them. Those from the statute book of the United States were passed during his presidency; he *approved them;* he *quotes* them in the very page that contains his philippic against the judges. The territorial law also passed during his presidency, and must have been officially transmitted to him by the governor. Nay more, his attention was called to them, and to the refutation which they give to the calumny he has revived; it was called to them by a publication which I have said was under his eye when he wrote. The same argument had been thrown out, not as I recollect in any publication, but in suggestions calculated to influence the ignorant: I had answered it in a publication made first in the papers of New Orleans, and afterwards repeated twice, first in the appendix to my address, and a second time in one of the arguments of Mr. Duponceau.* Both these publications were in Mr. J.'s hands, and to the first of them he frequently alludes in the course of his justification. This is the extract:

"But the cause,—says the voice of public clamour,—the "cause was tried by the court without the intervention of "a jury. None but the grossly ignorant, or the perversely "wicked, can make this a ground of accusation against the "plaintiffs.—The trial by jury, in civil cases, is a privilege "which by the laws of the territory either party may claim at "their pleasure. When neither demand it, the privilege is of "course waved. Here the defendants have not even inadvert-

* *Review of the cause of the New Orleans Batture*, &c. Philad. 1809.

" ence to plead; the mode of trial was a matter of *deliberation*
" *and choice*, for I have seen the draft of an affidavit which
" judge Moreau, the defendants' counsel, told me he was about
" to make, in which he gives a reason why they did not chuse
" to ask one; and this reason, if I recollect aright, was that they
" apprehended they would not be permitted to have a jury com-
" posed of inhabitants of the city (that is to say of the parties
" to this cause!) What would have been said of the defendants
" if *they* had testified even a desire to have persons interested
" in their purchase, not only examined as witnesses, but sworn
" as jurors in the cause? Nothing, indeed, *could* have been add-
" ed to the obloquy which has been cast upon them; but if such
" *had been* their conduct, I should candidly confess there is
" little of it they would not have deserved."

Orleans Gazette, *Nov.* 16, 1807.

This publication, let it be remembered, was made in 1807, in the Gazette of New Orleans, it had been twice republished; if the law or the practice of the court had been misrepresented, would not some reply have been made? if the communication made by Mr. Moreau had been misunderstood, would not some explanation have been given? Not a word has been or could be said on the subject. The law was truly stated, the fact was well understood; and with the knowledge of both, Mr. J. has not scrupled to wind up his work by repeating the serious charge which they fully refute.

The task I had imposed on myself is now finished, and I commit with satisfaction my cause to the public. It is not one of mere interest either to me or to my adversary; as he has managed it, the question involves considerations of higher moment to us both: I am an intruder on the public, or he an invader of private rights.—The only true enquiries were, Was the land in question the property of the United States? Had the president a right to seize it if it were? A dignified defence would have been confined to the support of an affirmative answer to these propositions;—Innocence would have rejected the doubtful advantage to be derived from even a just attack; Integrity and Honour would have disdained the aid of unjust accusations, however plausible; Magnanimity would have scorned the effect of an appeal to popular prejudice:—but in this case we look in vain for these results. All these means, however unworthy, are resorted to; and in order to prove that the land be-

longed to the public, and that I was rightfully expelled at the point of the bayonet, the public are told:

1. *That the premises did not belong to John Gravier, under whom I claim, but to him jointly with his brothers and sisters.*

To this I have answered that if true it forms no justification; that the property of the brothers and sisters ought to have been as sacred as that of the seller to me.

That the fact is not true, that the whole of his deceased brother's estate, of which this formed a part, was inventoried and sold to John Gravier, and

That the absent heirs have ratified the sale.

2. *That my counsels first suggested to Gravier the prosecution of a dormant claim.*

To this accusation I have replied that if the claim were just, I consider it as no reproach, to have given my aid to its prosecution, and that to point out his rights to a client, is one of the first duties of an advocate.

But that the allegation, whether it constitute a merit or a reproach, is totally without foundation.

That Gravier's ancestor, ten years before my arrival, so well knew his right to this property as to sell several parcels of it by public recorded acts.

That Gravier himself, long before my arrival, had enclosed a very large portion of it.

That, before the purchase in which I was concerned, two very respectable gentlemen in the city, were in treaty for the same property, and

That even before the cession the Spanish governor thought it necessary to procure Gravier's license, before he could make use of the ground for a public purpose.

3. *It is objected that Delabigarre's purchase was of a litigated right, and therefore void and* CHAMPERTOUS.

To this also I have answered, that, if the charge were true, it gave no right to the United States, and that all the crimes he could heap on the memory of the unfortunate Delabigarre, would not lessen the weight of his own responsibility, in taking for the public that which did not belong to them.

But I have shewn that the charge is unfounded as well as irrelevant:

Because Gravier was in actual possession of a part of the thing sold.

Because he had a constructive possession of the residue.

Because no one had then heard of the only adverse claim which now exists.

Because the claim of the corporation was an illegal one, and has so been determined by a final judgment, and even by their own acknowledgement.

Because, even if a just claim, as it was only of a servitude, the proprietor might legally sell the soil.

And I have shewn that the suit could only have been carried on in the name of Gravier, because the sale under private signatures amounted by the law of the land to no more than *a covenant to* sell.

4. *It was asserted that if, by the terms of his grant, Gravier was the owner of the alluvion, he had disposed of it to the purchasers of the front lots, by using the same expression in his sales to them.*

For the fourth time the answer was repeated, that if the fact was ascertained, it only changed the name of the person aggrieved, and that the offence of illegally taking the land, was as great if the title were in A, as if it belonged to B.

But a complete refutation of the fact, was given by shewing that in general the front proprietors' deeds referred to a plan which made them limited and not riparious proprietors.

That in cases where there was no such reference, and where the alluvion was really granted, I had become the *purchaser* and united both titles.

Preparatory to the discussion of the title of the United States, I have shewn from the geology of the country, the nature of its conformation and the characteristics of the premises in question; —the gradual formation of similar parcels of land, and the uniform occupation of them by the proprietors of the adjacent soil has been proved, as well as the utility of the improvements I was making; and it was demonstrated from a review of the original grant, and the chain of title, that those under whom I claimed owned and possessed to the water's edge.

The enquiry by which law the question of title was to be decided has been pursued, and strong reasons given to believe that the President erred in selecting the French rather than the Spanish code.

But that taking the French laws to be the rule in this case,

they give the alluvions not to the sovereign but to the adjoining proprietors; and this is proved:

By the opinion of their jurists, the decisions of their tribunals, and the formal recognition of the sovereign in the celebrated Bordeaux case.

I have shewn that the premises have no one characteristic, by which they can be denominated the *bed* or the *beach* of the river, and that if a part of them still form the bank, that bank is *acknowledged* and proved to be private property.

The distinction attempted to be taken between the right to alluvion in urban and in rural estates, has been discussed and proved to be without foundation.

The nature of alluvial increase has been defined, and by its application to the premises in question, the fanciful derivations and reasoning created to shew that they could not be called an alluvion have been exposed.

The rights of the public to the use of the bank for the purposes of navigation have been acknowledged, while the property of the soil has been proved to reside in me, and from the most convincing documents I have demonstrated that my works did not tend to interfere with, but on the contrary to facilitate that public use.

The singular idea that the President of the United States is required or authorized to abate nuisances in the city of New Orleans, has been exposed to the derision it deserves, and the flimsy nature of this subterfuge has been shewn:

By the words of his warrant of dispossession, which speaks of an intrusion upon public lands, not of the abatement of a nuisance—

By the conduct of those who executed it, in removing the possessor and leaving the works which are supposed to be nuisances—

By the awkward manner in which this plea is pushed forward for the first time in the last stage of the controversy.

The existence of any nuisance has been denied, and the efficiency of local laws for its removal, had it existed, has been shewn.

The assertion that all governments maintain the right of seizing their own at *short hand* has been fully disproved by reference to the English, French, and Spanish laws; and it is shewn by a review of the principles of our own constitution, that they do not sanction the practice.

The authority assumed under the law of 1807, has been examined, and the following conclusions have been drawn—

That the case to which it was applied, comes neither within its letter nor its spirit.

That even if its circumstances came within the purview of the law, some of the most material provisions of that law have been totally disregarded.

And that if the law authorize the proceedings had under colour of it, the law itself is unconstitutional and void.

The conduct of the territorial judges who rendered the sentence in favor of Gravier has been vindicated, and the charge of their having assumed illegal and unusual powers has been shewn to be produced either by an utter ignorance of the law, or a culpable misrepresentation of it.

Having thus laid my own title, and that of the United States before the public,—having tested the proceedings of the executive by the rules of positive law, the unbending precepts of the constitution and the unerring principles of free government—and having demonstrated those proceedings to be illegal, unconstitutional and oppressive; I shall now enquire what excuse there is in the plea of honest error, supposing it to have existed, and what grounds there are for believing that the motives were such as could inspire the conscious rectitude which is affected in the close of the work?

First.—Error of judgment is no excuse to an *executive officer;* he must execute the laws at his peril.—In this respect judicial and executive officers have a different responsibility; the judge, unless there be corruption or such a manifest breach of positive statute as supposes corruption, is not liable for a misconstruction of law; but a ministerial officer must execute the law at the risque of making good all damages arising from his misconduct or even his errors.

A sheriff cannot justify the arrest of A, by proving that he took him for B, against whom he had a writ.

The captain of a frigate shall not be excused from damage for bringing in a friendly vessel or one of his own nation, because he thought it the property of an enemy.*

* In cases where this excuse has been deemed good, there was always some default on the part of the captured, which led to the error.

Nay more: he shall not be excused, although in making the capture he shall have followed the express instructions of the President, if those instructions were not given according to law.*

Mr. Jefferson shews more art than fair argument in putting the responsibility of the executive on the same footing with that of the members of the legislative and judiciary branches.—They are widely different. The representative is only bound to pursue the measures he *thinks right;* he is under no obligation always to think right. The judge is to decide according to law where it is positive; according to *his opinion of it* where it is doubtful. The President has no such discretion, unless it be expressly given, and it cannot be given, under our constitution, in cases properly cognizable, as this is, by the judiciary, in cases of *meum* and *tuum* as I have shewn this to be. There are cases, however, in which a discretionary power might be granted by law, and in which an honest error would excuse.—The legislature might, for instance, create an office, and direct that whenever the President *thought* the officer had been guilty of malfeasance, he might remove him.—Here the President, believing in the ill conduct of the officer, might remove him; and, though the man should be innocent, the President would incur no responsibility,—but if the provision had been, that the President should remove in case of malfeasance only, then he would remove at his peril, in case the misconduct could not be proved.

The United States make a law granting the right to occupy the square in the federal city around the Capitol to an individual; but direct, that in case he shall commit waste, the president shall deprive him of the possession. Can it be doubted, that if the tenant has committed no waste, and the president dispossess him, he will have a right to recover the value of his term, although the president may have acted honestly under a belief of the fact?—The case would be different if the law had empowered the president to dispossess, if, *in his opinion*, the occupant injured the freehold.—Thus, in my case, the law authorizes the president to remove settlers from public lands, and in the exercise of his duty, he removes a man from the possession of his own land; can it excuse him to say, he thought the pro-

* 2 Cranch, 115. Ibid. 176.

perty belonged to the public?—I think not; because that plea would always be ready to justify every outrage, as wilful misconduct is rarely to be proved, and error of judgment will generally be presumed.

The principle, then, I think, is reducible to this:

Error in judgment shall only excuse an executive officer, where he is expressly directed by law to act according to the result of his own opinion.

And that, only in cases where there is no constitutional bar to his being invested with such discretionary power.

But in this case I have shewn, that nothing is either expressly or impliedly left to the judgment of the president, under the law of 1807.

And that if the question of property were by that law referred to his decision, that law would be unconstitutional.

Therefore, error in judgment is no excuse for the act.

Nor will such consequences result from this responsibility, as the apprehensions of the late president have drawn. We shall find men of respectability, talents and integrity, to fill our executive offices, even although it should be determined that they cannot protect themselves against the consequences of illegal acts, by the plea of an error in judgment. The establishment of this doctrine will not, as is supposed, call paupers to the seats of office. But let the reverse be known, let every executive officer fully understand that he may oppress with impunity, provided he will but declare, that if he erred, it was an error of the judgment, and we shall then, indeed, not find "*paupers*" *in office.* The system provides an excellent remedy against that evil,—but we shall find them every where else, and the people, under such a government, would soon be reduced not only to mendicity, but despair. But if this should be a good defence, can Mr. Jefferson use it?—Will the circumstances of this case permit him to say, that he has acted with pure intentions, and according to his own sense of right?—I will not say, that his profession of conscious rectitude is insincere, because none but the Supreme Being can judge the purity of the mind; but this I can say, that if he really think his own conduct to have been legal and meritorious, his sense of right and wrong is entirely confounded, and his principles are even more dangerous than his practice. There are some circumstances, however, in his conduct,

which, with every charitable inclination, it will be found difficult to reconcile to that purity of intention which the late president professes. A laudable zeal to defend the title of the public to its property, which was invaded, would not have been satisfied with the expulsion of one intruder, while thousands beside him were suffered to occupy the lands of the nation; the constitutional duty of "seeing that the laws be executed" would not have been complied with by enforcing them against a single offender.—Paternal solicitude for the city, and a desire to preserve the free navigation of the river, had they been true motives, would have guarded against every attempt to injure them, and if I shew that others were circumstanced exactly as I was with respect to property of the same description—that the president knew it, that he suffered them to continue their possession, and deprived me of mine,—I then reduce him to the dilemma of confessing that he acted oppressively towards me, or unjustly towards the public, whose rights he was bound by the same duty to enforce without distinction of persons against all, and our belief in the sincerity of his professions must suffer some diminution, when we recollect that the unmolested possessors of this property, pretended to be that of the public, were men of influence and wealth, while the one selected for the display of executive energy was poor, and supposed to be unpopular. The first ground, and, as I think I have shewn, the only ground originally taken by Mr. Jefferson, was that all alluvions belonged by the laws of France to the crown, and that by the transfer of the province, those regal rights were vested in the United States. If he honestly believed this, and thought it his duty to seize property of this description, if by his construction of the law it enabled him to do this at *short hand*, why, I ask, under this sense of duty, and with these means provided for the performance of it, why has he neglected the public interest so as to suffer thousands of acres of this species of land, so manifestly belonging to the nation, to remain in the hands of the wealthy planters who possessed and still possess it, while he chooses in a solitary instance, the property of the widow, the orphan, and the stranger in the land, to manifest his regard to official duty?—Can the "erect attitude of conscious innocence" be preserved while an answer is given to this question? Can any answer whatever be given to it?—He was ignorant, perhaps, of

other intrusions, mine was the only one officially denounced to him.—Not so—every line he read on the controversy, every traveller who spoke to him of the country, the very nature of its conformation, must have informed him that lands of this description existed in every bend of the river, and as to the denunciation, *that* operated exclusively in my favour; because it was accompanied with documents which shewed that my title had received the sanction of a judicial decision, an advantage which was wanting to the other alluvion lands in the country;—a due respect, therefore, for the judiciary department would have dictated his choice of another *intruder*, if it were true that all the possessors of *battures* merit that appellation.

Was there, then, any thing peculiar in the title to the Gravier tract, which made the alluvion annexed to it more clearly the property of the United States than those accruing to other lands?—No. Let the reader cast his eye on the plan; he will there see that the Jesuit's plantation is divided into five lots, four of which were respectively owned at the time of the seizure of mine, by Mr. *Duplantier*, Mr. *Solet*, Mr. *Robin*, and Mr. *Livaudais*, or persons holding under them, and one by Mr. *Gravier* or his vendees.—Now, as all these portions of the original grant were sold at the same time, under the same circumstances, and by the *same words and mode of conveyance*, to the different vendees and the accession had been formed in the same manner to all of them, there can be nothing in the *title* that could justify a discrimination between the lands of Gravier, and those of the other proprietors. Yet *his* were taken, and the others were left. But the favoured proprietors were among the most influential and wealthy inhabitants of the country. The road, perhaps!—Unfortunately it ran in the same manner in front of Duplantier, Livaudais, and others, that it did in front of Gravier.

The urban and rural distinction!—Gravier's land had become a suburb! so are Livaudais', Duplantier's, Solet's, and Robin's;—not all, I grant, at that period, but all for many years since; yet not one single indication has been given of a claim on the part of government.

But, a care to preserve the navigation of the river! the dangerous works of Mr. Livingston!—Another glance at the plan shews, that if his works were dangerous, those which were suffered without interruption to be completed were much more so. The levée of 1805, opposite to the other suburbs of Du-

plantier, &c. projects twice as far into the river as mine, and incloses a space of nearly eight times the area. So that if mine were dangerous, this was so in a quadruple ratio. Yet these "*aggressors*" were suffered peaceably to go on with their "*encroachments on the bed of the river*," and are permitted to enjoy the fruits of their labour. No cabinet council is called for them;—no warrants issued,—no troops ordered to be held in readiness, to enforce its execution. Every thing is quietness and calm, while the storm rages the moment I attempt to make the same use of my property they have done of their's: Why this distinction? Can the man who made it, arrogate to himself the attribute of impartial justice?—Can he assume the "*erect attitude*" of conscious innocence?—No;—his true justification is inadvertently given in another part of his conclusion. The act was popular as it respected my lands, and would have been the reverse as respected the others. Mine lay convenient for public use, the others were somewhat more remote. I was supposed to have no influence—that of Mr. Livaudais, and the others, from their great wealth and deservedly high standing, was known to be very great. Hence, the addresses, the newspaper paragraphs, the benedictions (as Mr. Jefferson calls them) of a province.

He has lived, however, one would suppose, long enough in political life, to know the just value of these addresses, on which he so much relies;—most unfortunately, in our government they are proofs of nothing;—sometimes produced by intrigue, sometimes by corruption, generally by party feelings, rarely by good actions;—they are far from forming that kind of testimonial which a prudent man would refer to as a test of the correctness of his conduct. Mr. Jefferson's predecessor in the presidential chair, received, I believe, more addresses than any other man (not excepting WASHINGTON himself) in the same space of time, approving political measures which Mr. Jefferson strongly opposed; and for the reverse of which he himself was addressed from Georgia to Maine. Were all these addresses proofs of public sentiment?—clearly not.—Why, then, does he refer to them? He refers to them because they were uppermost in his mind through the whole course of the transaction; because they were the price of his disregard of the constitution, the motive for his contempt of the judiciary, and the reward of his violation of private right.

I now take my leave of Mr. Jefferson. In my answer, I have confined myself to his book. Notwithstanding the strong temptations which assailed me almost in every page, I have strictly kept within the boundaries of a just (and, I think, considering the wanton attack) a mild defence. My future conduct will depend much on that of my adversary. I shall continue to reply to every argument that may be addressed to the public on this subject. Knowing that my cause is good, I do not despair even with humble pretensions, to make its justice appear. For this purpose I have always courted investigation; I should have preferred it in a court of justice, but do not decline it before the public.

Though some may condemn me only on hearing the name of my opponent, there are many, very many in the nation, who have independence enough to judge for themselves, and the ability to decide with correctness,—to such I submit the merits of a controversy which has been rendered interesting as well from the constitutional as the legal questions it involves, and on which Mr. Jefferson has, by his management of it, staked his legal, his political, and almost his moral reputation—That he should not have understood the nature of my title and the different foreign codes on which it depends, is no reproach—That he should have acted at all without this knowledge, must surprize—that he should have acted forcibly, must astonish us—But, that he should persevere in the same pretence of understanding the laws of France better than gentlemen bred to it from their childhood, and who, engaged on the same side of the controversy with himself, have abandoned the ground he has taken—That he should obstinately justify an invasion of private property, in a manner that puts it in the power of a president with impunity to commit acts of oppression, at which a king would tremble—That he should do all this, and still talk of conscious rectitude, must amaze all those who look only to the reputation he has enjoyed, and who do not consider the inconsistency of human nature, and the deplorable effects of an inordinate passion for popularity.

EDWARD LIVINGSTON.

New Orleans, 1*st July*, 1813.

POSTSCRIPT.

A DECISION has at length taken place in a court of justice on the legality of Mr. Jefferson's proceeding.

A suit was brought against the marshal, in the district court of the United States for the Orleans district, according to the forms of the civil law,—the object of which was to obtain damages for the expulsion, and to be restored to possession.

The defendant pleaded the warrant of the president as his justification.

To this the plaintiff demurred, and after argument the Court on the 4th of August last, decided that the warrant was illegal, being unauthorised by the act under which it purports to have been issued; and directed that the plaintiff should be restored to his possession, which was accordingly done. A report of this case will in due time be given to the public.

EDWARD LIVINGSTON.

New Orleans, 1*st Sept.* 1813.

APPENDIX.

No. I.

Proof that Mr. Gravier had begun to improve the batture before the cession of Louisiana to the United States.

(Translation.)

Deposition of *John Lewis Laurent*, inhabitant of the city of New Orleans, made the 17th March, 1808, before me, the undersigned, justice of the peace:

THE said deponent being duly sworn according to law, doth depose and declare, That about the end of the year 1803 or the beginning of the year 1804, he was requested by Mr. John Gravier to measure off a space of about 400 feet, fronting the square between the streets Julie and St. Joseph, and extending five or six hundred feet towards the river, and that immediately afterwards Mr. Gravier set his negroes to work so make a levée quite round the said space which he had thus measured, and that the said levée was finished in the course of the winter of 1804, and that the said levée exists still so as to be traced in its whole extent.

JEAN LEWIS LAURENT.

Sworn and signed in my presence,
the 18th March, 1808.

B. VAN PRADELLES, Justice of Peace.

No. II.

Proofs that the batture was considered under the Spanish government as the property of Gravier.

LA ROCHE, being duly sworn, doth depose and say, That in the year seventeen hundred and ninety-five, and for some time previous thereto, Laurent Sigur, the father-in-law of this deponent, had a contract for supplying the royal navy of Spain with masts.—That in the spring of the said year, a very large raft of

masts having come down the river, and that part of the shore below the city where they had been usually placed, being very much encumbered, the said Sigur desired the deponent to go to the governor (then the Baron de Carondelet) to get his directions where he should deposit the said masts.

That the deponent accordingly went to the Baron de Carondelet, with Mr. Lovio, the minister of marine, who, after hearing the statement of the case, directed the deponent to go to Bertrand Gravier, and request him in his (the governor's) name, to give permission to lay said masts on the batture in front of the fauxbourg—adding that if Gravier refused, he would endeavour to find some means of making him consent.

That the deponent accordingly went to Gravier with the governor's message, who readily consented, and the masts were accordingly placed on the batture, where they remained for a long time, at least eighteen months.

And this deponent further saith, that some time after the period above spoken of, and, as he thinks, in the year seventeen hundred and ninety-eight, Bertrand Gravier being then dead, he was again sent on a similar message to governor Gayoso, then governor of the province, who directed the deponent to go to John Gravier, the present proprietor, and ask his permission to lay up the masts on his batture, which the deponent did. Gravier consented, and the masts were accordingly placed on the batture opposite to Mr. Eva's, the captain of the port, and from thence upwards.

And the deponent further saith, that Bertrand Gravier had, for a number of years, a very large brick-kiln, and that he always took the earth for the same from the said batture, and from no other place.

ROCHE.

Sworn to and signed before me,
March 21st, 1808.

B. VAN PRADELLES, Justice of Peace.

Laurent Sigur, being duly sworn, deposeth and saith, that he sent the above deponent La Roche to the governors Gayoso and Carondelet, at the several periods and for the purposes mentioned in the preceding deposition, and that the answers then reported to him by the said La Roche, as coming from the

Baron de Carondelet, governor Gayoso, Bertrand Gravier and John Gravier, perfectly accord with the statement in the above deposition.

L. SIGUR.

Sworn to and signed before me,
March 21st, 1808.
B. VAN PRADELLES, Justice of Peace.

No. III.

Certificates to the character of the above witnesses, and of Mr. Parisien, mentioned above, p. 21.

I certify that Mr. Laurent Sigur has been well known to me since my first arrival in this country. That he has always sustained the character of a very respectable worthy man, and is a planter residing in the vicinity of this city. And that he was captain and commandant of Iberville under the Spanish government, and was much considered under that government.

WILLIAM C. C. CLAIBORNE.

New Orleans, 10*th June*, 1813.

City and Parish of Orleans, ss.

I do hereby certify that I have known Mr. Nicholas Roche of the city of New Orleans for several years last past, and that he is a man of good moral character and conduct, that he has resided in this city for more than twelve months, and that he is upwards of twenty-one years of age.

Given under my hand at the city of New Orleans this 24th day of November in the year of our Lord 1809, and in the 34th year of American Independence.

(Signed) L. MOREAU LISLET.

I do hereby certify the above to be a true copy from the original certificate given in the above case.

L. S. THO. S. KENNEDY, Clk.

Nous, Pierre et Ant. Carraby, négociants en cette ville de la Nouvelle Orléans, certifions à qui de besoin peut être; avoir connu le défunt Louis Henry Parisien, pour une des personnes honnêtes avec qui l'on puisse traiter; et qu'avec nous, soit sous

notre raison soit individuellement, sa probité ne s'est jamais démentie, non plus qu'avec maintes autres personnes, qui, à notre connoissance ont eu affaires avec lui. Délivré sous notre signature à telles fins que de raison. Nouvelle Orléans, le 11 Xbre 1812.

P. & ANT. CARRABY.

Je soussigné, déclare et certifie sous la foi du serment, qu'ayant connu feu Louis Henry, surnommé Parisien, dès l'année 1792; ayant même été avec lui en relations et concurrence d'affaires et d'entreprises publiques assez épineuses, j'ai toujours reconnu en lui un homme d'un commerce sûr, d'une probité et d'une délicatesse à toute épreuve: En foi de quoi je délivre le présent pour valoir ce que de droit. Nouvelle Orléans, le 13 Xbre 1812.

D. D. DES ESSARTS.

(Translation.)

We, Peter and Anthony Carraby, merchants of this city of New Orleans, certify to all whom it may concern, that we have known Louis Henry Parisien, deceased, to be one of the most honest men with whom a person could deal; and in his dealings as well with our commercial firm as with us individually, he never deviated from the line of probity, and was the same in his dealings with many other persons, who, to our knowledge, have transacted business with him. Given under our hands, to serve all lawful purposes. New Orleans, 11th Dec. 1812.

P. & ANT. CARRABY.

I, the underwritten, do declare and certify as if I were upon oath, that having been acquainted with the late Louis Henry, surnamed Parisien, since the year 1792, and having been concerned with and against him in business, and in public undertakings of an intricate nature, I have always known him to be a man on whom reliance could be placed, and whose delicacy and probity could not be shaken. In faith whereof, I have delivered the present certificate, to avail as may be just and right. New Orleans, 13th Dec. 1812.

D. D. DES ESSARTS.

No. IV.

Proofs that my improvements on the batture were not dangerous, but, on the contrary, would have been highly useful to the city of New Orleans.

We, the subscribers, captains of vessels now lying in the port of New Orleans, do certify, that we have examined the canal constructed, and nearly completed by Edward Livingston, Esq. on the batture of the suburb St. Mary; and we are of opinion, that the said canal, when completed, will be of the greatest use to commerce, by affording a convenient birth for ships and other vessels; and that similar canals, constructed along the whole front of the said suburb, particularly when stores shall be erected on the sides, will greatly facilitate the lading and unlading of vessels, without the expense of cartage. And we are further of opinion, from examining the current of the river at high water, that the said canals will not render the current more rapid, or the harbour more inconvenient or less secure; but, on the contrary, will afford both convenience and safety so the shipping.

Samuel Orr, *ship Baltic, of Portsmouth, N. H.*
E. C. Gardner, *Western Trader, of Philadelphia.*
Jas. Patterson, *Moses Gill, of New-York.*
Levi Joy, *Yorkshire, of New-York.*
Charles Clasby, *Orion, of Philadelphia.*
Charles Coffin, *ship Rover.*
Henry Sayward, *ship Flora.*
A. P. Walsh.
Thomas Pollock, *commander pro tem. Revenue Cutter, Louisiana.*
W. M. Harris, *Amiable Lucy, New Orleans.*
William Torrey.
Z. Butler, *Perseverance, of Philadelphia.*
Robert Harrison, *Catherine, New Orleans.*
James D. Nicholas, *Polly, New York.*
Phil. C. Hogan, *brig Traveller, New York.*

New Orleans, ——— ——.

Sir,

I hope you will excuse my not answering your note on the subject of the works you had begun, in the front of the suburb St. Mary, sooner; however, I hope my answers to the queries contained therein, are still in time.

To the first I answer, that I have seen the canal, as well as the other works you had commenced, and the plan exhibited in the coffee-room.

To the second, as to the effect the completion of the plan might have on the harbour, it is almost impossible for any one to say; it is time only can decide that question. But I have no hesitation in saying, that I cannot conceive what injury the shipping can ever receive from the completion of the plan.

To the third, whether the canal, in its present imperfect state, has not been found a safe and convenient harbour for boats, every honest man will answer in the affirmative. What water there may be in the canal I cannot say; but I think there must be at least ten feet; and I am very sure, that any craft lying therein, is less exposed than at the levée. I do believe, that the completion of the plan would be of great advantage to the trade of the western country, in securing the boats from the gales to which they have hitherto been exposed. There is not a year in which a number of them are not sunk; but if the works alluded to were completed, they would be out of danger the moment they arrived.

I remain, with esteem,
your humble servant,
S. B. DAVIS.

New Orleans, April 4, 1809.

SIR,

I have the honour to acknowledge the receipt of your letter of the 10th ult. and should have replied to it at an earlier date, had not my duties compelled me to be absent from the city from that time until the 25th; since which period I have waited in expectation of an opportunity of seeing your plans, and thereby having it in my power to express to you my opinion fully on the subject. As they have not been presented to me, and not knowing the person in whose possession they may be, or to whom I should apply for the necessary information, to enable me to answer satisfactorily all the interrogatories you have, in so flattering a manner, proposed to me, I felt it my duty to inform you of the same: in order (if time should admit) that the person charged with them may present them, and give me suitable explanations; at present, sir, I can only answer your third, and part of the fourth questions.

"Third: Whether, in its present imperfect state, the canal already made, is not a safe retreat for the river craft; and, whether you do not think it will continue so during months, when high winds mostly prevail in these latitudes?"

"Fourth: Whether this canal, at the present season, and, when completed, at all seasons of the year, would not be a very safe birth for the gun boats of the United States; and whether it would not be a very great accommodation to the service, if two or three such canals were constructed, with adjoining stores for the rigging, &c. of the navy?"

Answer: As a proof that the canal commenced by you, is considered not only a safe, but very convenient retreat for river craft, I shall only state, that at all seasons of the year, when the height of the water will admit, it is filled with river craft, and chiefly those which prefer a *secure* situation, to enable them to make their repairs, and to preserve cargoes of great value; and a similar convenience for the gun vessels, would certainly be a very desirable object.

The effect the completion of your design would have on the currents, as I have not seen the plan, I cannot presume to state; it appears to me, however, that it must already have tended, in a small degree, to increase the eddy on the New Orleans side of the river, and, of course, made the current more rapid on the opposite. Whether this is an advantage or disadvantage to the shipping lying at the levée, I am equally at a loss to determine; and am doubtful whether it does, in any way, affect that part opposite the centre of the city. If it is a disadvantage, it is one I have never yet heard complained of by mariners. An advantage, I should suppose, would result to the city, by the increase of land occasioned by the deposit in this eddy, and the consequent safety of the levée; but on the opposite side of the river, the effect must be the reverse; the river will certainly make encroachments there, as the land on the city side increases. This local effect, however, can be considered of little moment in a river *that is constantly shifting its bed;* and if this was not produced, by the projection of the levées, for the formation of your canals, it appears to me it would be produced, in a short time, by that constant deposit which has already formed, and is daily increasing that part of the batture which appears the cause of so much contention. For it is a well known fact, that when the

land on one side of this river increases, the opposite side, a little below, is swept away by the current; and this earth is deposited in the next eddy, to form a new point. Thus the river will forever change its bed; and the trifling increase or loss of a few acres of earth on either side, cannot be considered of sufficient magnitude to balance the smallest improvement of utility to navigation or commerce.

As respects the convenience or inconvenience that the completion of your plan would offer to vessels ascending or descending a river of such length, and so full of obstructions and difficulties as this, I cannot consider of any importance; the comparative extent of your plan, taking it on its largest scale, and all its conveniences and inconveniences, must, in this respect, be really so diminutive, as to render them objects of no note. If it did present obstructions or conveniences to ascending or descending, the extent of them could not, I presume, be more than a mile, the $\frac{1}{3000}$ part of the extent of the Mississippi. There is, however, an evil existing, the removal of which would certainly be hastened. The batture now in dispute, in high water forms a shoal, on which vessels frequently ground. If canals are cut there, and levées hove up, the evil will no longer exist. I can say nothing of the enormous sums which I should suppose had already been expended there; and not knowing the extent of your plan, I cannot form an idea of what it would cost to complete it. It, however, appears to me, that the expense that would be necessary in its present state, to clear out the annual deposits of the river, would be very considerable.

Excuse me, sir, for not answering your questions in the order they are placed by you; and I regret that the imperfect idea I have of your plans, should have prevented me from giving detailed answers to the whole.

I have the honour to be,
with great respect,
your obedient servant,
D. PORTER.

Edward Livingston, Esq.

New Orleans, April 6, 1809.

SIR,

Since I had the honour to write you on the 4th inst. I have seen, at the exchange, your plan of improving the batture in the upper Fauxbourg; have this day examined said batture carefully, and find, that it will always cause a strong eddy below, improved or unimproved. This shoal has but the depth of a few feet of water on it, in the present state (which is nearly the highest) of the river; and as the water which covers it is nearly still, the effects on the currents and eddies must be nearly, and perhaps quite, as great as if levées were thrown up on it; and, indeed, I cannot discover, that any evil could result to the port, should it be improved agreeable to your design. In a few years, the great deposit of the river will certainly produce the same effects as your contemplated improvements. And the only objection I can conceive, is the vastness of your plan. The expense to effect it would certainly be enormous; but, if completed, I am of opinion, it would be an object extremely desirable to all persons having property afloat in such frail vessels as the craft that *descend* this river; and if the design should be carried completely into execution, the upper Fauxbourg would be handsomely ornamented, and the value of property much increased in the part now least improved.

I have the honour to be,
with great respect,
your obedient servant,
D. PORTER.

ERRATA.

P. 57, line 31, for *Demoulin*, read *Dumoulin*.
P. 64, line 34, for quase, read quasi.
P. 135, line 9, for The government, read 1. The government
P. 138, line 13, for But I do not, read 2. But I do not.